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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

ROY C. HOPKINS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Reasons for granting the writ	4
Conclusion	10
Appendix	1a

CITATIONS

Cases:

Borden v. *United States*, 116 F. Supp. 873	6
Bramblett v. *Desobry*, 490 F. 2d 405, certiorari denied, 419 U.S. 872	5
Crenshaw v. *United States*, 134 U.S. 99	6
Keetz v. *United States*, 168 Ct. Cl. 205	8
Luckenbach S. S. Co. v. *United States*, 272 U.S. 533	5
Richardson v. *Morris*, 409 U.S. 464	5
Soriano v. *United States*, 352 U.S. 270	5
Standard Oil Co. v. *Johnson*, 316 U.S. 481	3
Taylor and Marshall v. *Beckham*, 178 U.S. 548	6
United States v. *King*, 395 U.S. 1	5
United States v. *Shaw*, 309 U.S. 495	5
United States v. *Sherwood*, 312 U.S. 584	5
Urbina v. *United States*, 428 F. 2d 1280	6
Young v. *United States*, 498 F. 2d 1211	4, 5, 8, 9

	Page
Statutes, regulations and rule:	
Lloyd-LaFollette Act, 5 U.S.C. 7501	9
Longshoremen's and Harbor Workers' Compensation Act, 5 U.S.C. 8171	9
Social Security Act, as added, 60 Stat. 979, and amended, 42 U.S.C. 410(a)(6)(B)(iv)	9
Tucker Act, as amended, 84 Stat. 449, 28 U.S.C. 1491	2, 3, 4
5 U.S.C. 2105(c)	9
5 U.S.C. 8501(1)(E)	9
28 U.S.C. 1346(a)(2)	2, 4
29 U.S.C. 201, *et seq*	9
AR 60–21/AFR 147–15, Chapter 1, Section II	6
AR 60–21/AFR 147–15, Chapter 5, Section IV	3
Rules of the United States Court of Claims, Rule 66(a)(1)	3
Miscellaneous:	
115 Cong. Rec. 3162 (1969)	7
Hearings on S. 980 before Subcommittee No. 4 of the House Committee on the Judiciary, 91st Cong., 1st Sess, (1969)	7
H.R. Rep. No. 91–933, 91st Cong., 2d Sess. (1970)	7
S. Rep. No. 91–268, 91st Cong., 1st Sess. (1969)	3, 7

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims (App., *infra*, pp. 1a–25a) is reported at 513 F. 2d 1360.

JURISDICTION

The judgment of the Court of Claims (App., *infra*, p. 9a) was entered on March 19, 1975. On June 11, 1975, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims has jurisdiction to entertain a suit against the United States for damages for the improper discharge of an employee of a military exchange.

STATUTE INVOLVED

The Tucker Act, 28 U.S.C. 1491, as amended by Pub. L. 91–350, 84 Stat. 449, provides in pertinent part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. *For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.*[1]

STATEMENT

On August 6, 1968, respondent was discharged from his position as a civilian employee of the European Exchange System of the Army and Air Force Exchange Service, a non-appropriated fund instru-

[1] The italicized language was added by Pub. L. 91–350 in 1970. Pub. L. 91–350 also added the identical language to 28 U.S.C. 1346(a)(2), which grants the district courts concurrent jurisdiction with the Court of Claims for claims not in excess of $10,000.

mentality (App., *infra*, p. 1a).[2] His removal was based upon alleged acts of misconduct incompatible with his continued employment (*ibid.*). Respondent's removal was sustained upon administrative review.[3] Respondent then commenced this suit against the United States in the Court of Claims, contending that his discharge was improper and seeking back pay and allowances.[4] Jurisdiction was asserted under the Tucker Act, 28 U.S.C. 1491.

[2] The term "non-appropriated fund instrumentality" indicates that, with minor exceptions, no revenues are derived from the United States Treasury. The Exchange Service constitutes the nation's third largest department store chain, with annual sales of over $3.5 billion. S. Rep. No. 91–268, 91st Cong., 1st Sess., p. 3 (1969). See also *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 484–485.

[3] A discharged Exchange Service employee may contest his discharge at a full evidentiary hearing before a grievance committee of three members, with one member of the committee designated by the employee himself; the employee is entitled to be represented by counsel and to cross-examine witnesses. See AR 60–21/AFR 147–15, Chapter 5, Section IV. The recommendation of the grievance committee is forwarded to the installation commander, who determines the correctness of the dismissal. The employee may appeal from an adverse decision of the installation commander to the "major commander" of the area, who renders the final decision. See AR 60–21/AFR 147–15, Chapter 5, Section IV, par. 100. Respondent exhausted these administrative remedies.

[4] We are advised that respondent died on June 7, 1974, after the commencement of this suit but prior to the decision of the Court of Claims. The representative of respondent's estate has not yet been substituted as a party, but under Rule 66(a)(1) of the Rules of the Court of Claims a substitution of parties may be made within two years after the death of the plaintiff.

The Court of Claims denied the government's motion to dismiss for lack of jurisdiction. The court acknowledged that prior to 1970 the Tucker Act had not conferred jurisdiction to review discharges of military exchange employees.[5] However, the court determined that the requisite jurisdiction had been conferred by a 1970 amendment to the Act, Pub. L. 91–350, 84 Stat. 449. That amendment confers jurisdiction over claims founded upon express or implied contracts with a military exchange, and the court held that respondent's relationship with the Army and Air Force Exchange Service was contractual.

REASONS FOR GRANTING THE WRIT

The Court of Claims erred in asserting jurisdiction in this case. The employees of military exchanges hold their positions by appointment, not by express or implied contract, and Congress did not intend to confer jurisdiction to review their discharges. The Court of Claims' construction of the Tucker Act is directly contrary to that of the Fifth Circuit in *Young* v. *United States*, 498 F. 2d 1211, which ruled that the Tucker Act, as amended, does not confer jurisdiction over claims arising from discharges of military exchange employees.[6] Moreover, if the decision below is permitted to stand, more than 100,000 employees of military exchanges will have access to the Court of Claims in the event of discharge.[7]

[5] We use the phrases "military exchange" and "military exchanges" throughout to refer collectively to the Army and Air Force Exchange Service, the Navy Exchanges, the Marine Corps Exchanges, the Coast Guard Exchanges, and the Exchange Councils of the National Aeronautics and Space Administration.

[6] The Fifth Circuit in *Young* was construing the 1970 amendment to 28 U.S.C. 1346(a)(2), but that amending language was identical to the language in 28 U.S.C. 1491 at issue here. Moreover, the purpose of the two amendments was necessarily the same, since they served to confer identical concurrent jurisdiction on the district courts and the Court of Claims. See *Richardson* v. *Morris*, 409 U.S. 464, 465–466; *United States* v. *Sherwood*, 312 U.S. 584, 591.

The Fifth Circuit nevertheless concluded in *Young*, in our view incorrectly, that it had jurisdiction under the Administrative Procedure Act. There is a conflict among the courts of appeals on that issue. See, *eg.*, *Bramblett* v. *Desobry*, 490 F. 2d 405, 407 (C.A. 6), certiorari denied, 419 U.S. 872.

[7] We have been advised that the total number of civilian employees of the military exchanges exceeds 100,000. Cf. App., *infra*, p. 14a and n. 1.

1. The decision in this case represents a departure from the "settled propositions that the Court of Claims' jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and that such a waiver cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4. See also *Soriano* v. *United States*, 352 U.S. 270, 276; *United States* v. *Shaw*, 309 U.S. 495, 500–501; *Luckenbach S.S. Co.* v. *United States*, 272 U.S. 533, 536. Apart from the authority expressly conferred by statute, "there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States." *United States* v. *Sherwood*, 312 U.S. 584, 587–588.

The Tucker Act, as amended in 1970 and insofar as is here relevant, confers jurisdiction on the Court of Claims over claims against the United States

founded upon "an express or implied contract with the [military exchanges]." The Court of Claims' fundamental error here lies in its determination that an employee of a military exchange enjoys a contractual relationship with his employer. With only minor exceptions not affecting this case,[5] the employees of military exchanges hold their positions not by contract but by appointment.

The governing regulations expressly provide for the appointment of the employees of military exchanges, in much the same manner as Civil Service employees are appointed (see AR 60–21/AFR 147–15, Chapter 1, Section II, pars. 8–12, 25), and it is established that government employees who hold their positions by appointment do not have a contractual relationship with the government. See, *e.g., Taylor and Marshall* v. *Beckham,* 178 U.S. 548, 576–577; *Crenshaw* v. *United States,* 134 U.S. 99, 104–108; *Urbina* v. *United States,* 428 F. 2d 1280, 1283–1284 (Ct. Cl.). Since respondent's claim was therefore not based upon an express or implied contract, the Court of Claims lacked jurisdiction to consider it.

2. This conclusion is supported by the legislative history of the 1970 amendment to the Tucker Act and by the care with which Congress has heretofore defined the rights of employees of military exchanges.

a. The legislative history shows that the purpose of the 1970 amendment was to effect a change in the remedial rights of independent contractors who deal

[5] Only in isolated cases will a military exchange enter into a contract of employment with an employee. See, *e.g., Borden* v. *United States,* 116 F. Supp. 873 (Ct. Cl.)

with the military exchanges. Congressional concern focused upon the claims of independent contractors founded on, for example, contracts for construction, supplies, or services. See, *e.g.,* 115 Cong. Rec. 3162 (1969); S. Rep. No. 91–268, 91st Cong., 1st Sess., p. 2 (1969); H.R. Rep. No. 91–933, 91st Cong., 2d Sess., p. 2 (1970); Hearings on S. 980 before Subcommittee No. 4 of the House Committee on the Judiciary, 91st Cong., 1st Sess. (1969).

Judge Skelton correctly observed in his dissent (App., *infra,* p. 13a) that the amendment represents "[t]he intention of Congress to close a loophole with respect to contractual claims of third party independent contractors * * *" and has nothing whatever to do with the separate question of the rights of discharged employees. As Judge Skelton further noted (App., *infra,* p. 14a):

> The legislative history speaks clearly and unambiguously. Public Law 91–350 was intended by Congress to waive sovereign immunity solely over claims of third party independent contractors arising as a result of contracts with nonappropriated fund instrumentalities such as the AAFES. The legislative history is silent concerning claims against the AAFES by employees. No reference is made to the lack of a Court of Claims forum for the resolution of pay claims or other employment grievances for AAFES employees. It seems clear to me that Congress did not intend to provide additional remedies for nonappropriated fund instrumentality employees when it passed Pub. L. 9–350

> [*sic*]; its only aim was to correct an anomalous situation with respect to those third party independent contractors having explicit contracts with the Exchange Services.

And as the Fifth Circuit pointed out in *Young* v. *United States, supra,* 498 F. 2d at 1215, there is no language in the legislative history that would support "an inference that Congress intended these amendments as a vehicle for redressing grievances of employees of these instrumentalities as well as settling claims of third parties with whom the instrumentalities contract for goods and services."[9]

The military exchanges employ more than 100,000 persons. See n. 7, *supra.* As Judge Skelton cogently remarked (App., *infra,* p. 14a), "if Congress planned to give such a vast number of individuals * * * a new forum [in which] to present their employment grievances * * *, some statement would have been made to that effect by the two Judiciary Committee Reports or during the debates."

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[9] One case cited in the legislative history, *Keetz* v. *United States*, 168 Ct. Cl. 205, did involve a claim arising out of the discharge of a military exchange employee. It was this citation upon which the majority of the Court of Claims relied here (App., *infra*, p. 9a). However, all other cases cited in the legislative history dealt with independent contractors, not employees. Thus, as the Fifth Circuit stated in *Young* v. *United States*, *supra*, 498 F. 2d at 1217, n. 5:

"* * * [I]n light of the fact that these cases were cited as instances where sovereign immunity had been held to bar suits, and were not discussed on their facts either in the debates or the reports and other documents accompanying the proposed amendments, we think the mere fact that *Keetz* was cited is not enough to defeat our conclusion [that the 1970 amendment did not confer Tucker Act jurisdiction]."

410(a)(6)(B)(iv), unemployment compensation-stat-

b. When Congress has intended to legislate with respect to the rights of military-exchange personnel, it has done so specifically and expressly. For example, the laws administered by the Civil Service Commission (with some specified exceptions) and the Lloyd-LaFollette Act, 5 U.S.C. 7501, are explicitly made inapplicable to the employees of the military exchanges. See 5 U.S.C. 2105(c). By the same token, military exchange employees are expressly granted the protection of the Longshoremen's and Harbor Workers' Compensation Act, 5 U.S.C. 8171, the Social Security Act, as added 60 Stat. 979, and amended, 42 U.S.C. utes, 5 U.S.C. 8501(1)(E), and various minimum wage and overtime benefit laws, 29 U.S.C. 201, *et seq.*

In contrast, the 1970 amendment to the Tucker Act contains no reference to the right of military-exchange employees to sue for back pay. As the Fifth Circuit correctly observed in *Young* v. *United States, supra,* 498 F. 2d at 1217 (footnote omitted):

> * * * In construing the 1970 amendments to the Tucker Act, we cannot ignore the fact that, in the much larger statutory scheme embracing federal employment, Congress has, when it has thought such action appropriate, dealt with Exchange Service employees directly and specifically. In our view, this circumstance, coupled with the dearth of concern with employment relationships in the legislative history of the 1970 amendments, strengthens our conclusion that those amendments were not intended to extend Tucker Act jurisdiction to the sort of "contract" plaintiff asserts existed in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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AUGUST 1975.

APPENDIX

In the United States Court of Claims

No. 342-72

(Decided March 19, 1975)

ROY C. HOPKINS v. THE UNITED STATES

Thomas H. McGrail, attorney of record for plaintiff.
Thomas W. Petersen, with whom was *Acting Assistant Attorney General Irving Jaffe*, for defendant.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*.

ON DEFENDANT'S MOTION TO DISMISS PETITION

KUNZIG, *Judge*, delivered the opinion of the court:

The issue presented in this case of first impression is whether we have jurisdiction to grant a money judgment against the United States for an alleged improper discharge of an employee by a nonappropriated fund instrumentality of the United States. We hold that the 1970 amendment to the Tucker Act (Pub. L. 91-350) confers jurisdiction on this court over the claim asserted by plaintiff.

Plaintiff was discharged on August 6, 1968 from his position as a civilian employee of the European Exchange System of the Army and Air Force Exchange Service (AAFES), a nonappropriated fund instrumentality. He was discharged for alleged acts of misconduct incompatible with continued employment. Plaintiff seeks by this suit to recover from the United States back pay and appropriate allowances for the period following his alleged improper

discharge. His action is grounded on the claim that his separation was arbitrary and capricious, was a breach of his contract of employment, and was in violation of due process and of prescribed regulations and procedures.

The United States has moved to have the petition dismissed on the procedural ground that no claim is stated within the jurisdiction of this court. For the reasons given below, we deny defendant's motion.[1]

LEGAL BACKGROUND

The doctrine of sovereign immunity precludes suits against the Federal Government unless such immunity has been specifically waived by an act of Congress. *United States* v. *Clarke*, 33 U.S. (8 Pet.) 436, 443 (1834). In this court, under the Tucker Act, 28 U.S.C. § 1491 (1970), only suits against the United States are permitted. Therefore, our jurisdiction exists only where such immunity has been waived. Prior to 1970, no act of Congress had waived sovereign immunity with respect to contracts of nonappropriated fund instrumentalities.

In 1942 the Supreme Court decided *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1942). It held that a state statute which imposed a tax on the distribution of motor vehicle fuel would be unconstitutional if it was meant to apply to the Army's post exchanges. The exchanges, the Court said, "are arms of the Government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department * * *." However, the Court also stated that the "Government assumes none of the financial obligations of the exchange." 316 U.S. at 485.

This latter statement in *Johnson*, *supra*, has served as the basis for a series of decisions of this court holding that we

[1] Judge Skelton, in his carefully considered dissent, suggests *sua sponte* that "plaintiff has not alleged a cause of action even under the theory of the majority and his petition should be dismissed." While this suggestion is interesting, it is premature at this time to decide this issue. Defendant has neither asked nor even suggested that the petition be dismissed on the ground that no claim is stated on which relief could be granted. Rather, defendant has moved to have the petition dismissed solely on the question of jurisdiction. By our decision today we do not foreclose the possibility of a future dismissal on the substantive ground the dissenting judge suggests. We merely hold that this court does have *jurisdiction* over the claim asserted.

lack jurisdiction over disputes involving claims against nonappropriated fund activities. The first such case was *Borden* v. *United States*, 126 Ct. Cl. 902, 116 F. Supp. 873 (1953). Borden had contracted with the Army Exchange Service to be a senior accountant for a 2-year period. The issue raised was whether the United States could be sued on this employment contract with a nonappropriated fund instrumentality. We held the United States could not be sued because, as the Supreme Court held in *Johnson*, *supra*, if the Government assumed none of the Army Exchange Service's financial obligations, then no consent had been given by the Government to such suits. A similar result was reached in *Pulaski Cab Co.* v. *United States*, 141 Ct. Cl. 160, 157 F. Supp. 955 (1958), wherein plaintiff company had a contract with an exchange to provide cab services. Again, in *G. L. Christian and Assoc.* v. *United States*, 160 Ct. Cl. 1, 312 F. 2d 418 (1963), *cert. denied*, 375 U.S. 954 (1963), we said in dictum, "[T]he contracts of such agencies [post exchanges, *et al.*] although made by Government officers, do not bind appropriated funds, do not create a debt of the United States, and may not be vindicated in this court." 160 Ct. Cl. at 14, 312 F. 2d at 425. More recently, in *Kyer* v. *United States*, 177 Ct. Cl. 747, 369 F. 2d 714 (1966), *cert denied*, 387 U.S. 929 (1967), we arrived at the same result with regard to a sales commission contract with a nonappropriated fund agency other than a post exchange.

Seeing the failure by other litigants to obtain relief under a contract theory, one plaintiff attempted to recover via a different route. In *Keetz* v. *United States*, 168 Ct. Cl. 205 (1964), the plaintiff sued to recover back pay on the ground that his separation from the AAFES as an employee was illegal. Rather than to assert a contract of employment, Keetz alleged that civilian employees of post exchanges were Federal employees and relied on the violation of regulations of the executive department as a jurisdictional basis for his suit. We denied recovery, holding that plaintiff was not a Federal employee. No elaboration was made, but the *Keetz* court cited *Gradall* v. *United States*, 161 Ct. Cl. 714, 329 F. 2d 960 (1963), in which it was held that plaintiff's employment in the AAFES did not constitute a civilian "office or position

under the United States Government" within the meaning of the dual compensation provision, § 212(a) of the Economy Act of 1932. In *Gradall*, the court reasoned:

> The trend of the pertinent decisions, statutes and regulations has generally been to establish that employees of Exchanges are not Federal employees, except for the purpose of unemployment compensation. However, this trend does not supply a definitive answer to what is meant by holding a position "under the United States Government" under the [Economy] Act of 1932. The Government contends that the logical and reasonable test is whether the services performed in the position constitute "Federal service" because performed for a Federal instrumentality, and not whether the person who holds the position is compensated by appropriated or nonappropriated funds. To accept this test as determinative merely because plaintiff performed services for a Federal instrumentality would be to accept an unrealistic and nebulous view of the actual "position" of both plaintiff and the instrumentality. For example, the American Red Cross, the United Service Organizations, the national banks, and several other institutions are "instrumentalities" of the Government. However, their employees are not subject to the dual compensation restrictions of the Act of 1932. No one has ever contended that they hold a position "under the United States Government" under the Act.

Gradall at 720–21, 329 F. 2d at 964.

In summary, the decisions of this court prior to the enactment of Pub. L. 91–350 (1970) have held that no judisdiction has been granted to hear claims against the United States where a nonappropriated fund agency is involved since (1) the United States did not obligate itself on contracts of such agencies, and (2) employees of such agencies do not qualify as Federal employees.

ENACTMENT OF PUBLIC LAW 91–350

While this court recognized a lack of jurisdiction over claims against nonappropriated fund activities, we also recognized the harshness of the result which effectively precluded alleged injured plaintiffs from obtaining a forum in which the merits of their claims could be aired. In *Keetz*, *supra*, we stated:

> We are aware that plaintiff is placed in somewhat of a difficult position in that if he seeks redress of his claim in a Federal District Court directly against the Exchange Service his claim might be dismissed. * * * However, we believe that in these situations (especially where the question of the waiver of sovereign immunity is involved) it is up to Congress to remedy this apparent harsh result, and the courts should refrain from legislating by judicial fiat.

Id. at 207.

The injustice and inequity worked by this jurisdictional "loophole" was again identified in *Kyer*, *supra*, where we stated:

> We are mindful of the fact that the result reached spells an unduly harsh result. Plaintiff has searched in vain for a forum in which the merits of his claim might be aired. We add, though perhaps of little comfort, that the lack of jurisdiction which plaintiff has faced at every turn is a matter which sorely needs congressional correction.

Id. at 754, 369 F. 2d at 719.

It was within this setting that Congress, in 1970, enacted Public Law 91–350. The Tucker Act was amended in order to remove the sovereign immunity of the United States with respect to contracts of post exchange operations conducted within the military and the National Aeronautics and Space Administration. *See* H. R. REP. No. 91–933, 91st Cong., 2d Sess. 3 (1970).[2]

By this act, both 28 U.S.C. § 1346(a)(2)[3] and 28 U.S.C. § 1491[4] were amended to include the following new sentence:

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[2] Pub. L. 91–350 was originally passed by the Senate as S. 980. The Senate version would have completely removed the sovereign immunity of the United States with respect to contracts of all nonappropriated fund activities. See S. REP. No. 268, 91st Cong., 1st Sess 4–5 (1969). This bill was amended in the House of Representatives to remove immunity only from contracts of Exchange operations. The reason for this limitation was to insure that immunity would be waived with respect to nonappropriated fund instrumentalities *which have sufficient assets to pay their own way*. The amended act also added the requirement that the United States be reimbursed by the exchange instrumentality in the event any judgment against an exchange is paid by the United States. The intent of the House amendment was to eliminate any costs to the taxpayers of this expanded jurisdiction. *See* H.R. REP. No. 91–933, 91st Cong., 2d Sess. 3 (1970). The Senate agreed to the House amendments on July 14, 1970.

[3] Concurrent jurisdiction granted to the United States District Courts.

[4] General jurisdictional grant to the United States Court of Claims.

> For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

Thus, for the first time, Congress expressly waived sovereign immunity to claims arising from post exchange contracts, thereby bringing such actions within our jurisdiction under the Tucker Act.

Applying this new amendment, plaintiff has asserted his claim can now be heard in this court. Relying on *Keetz, supra*, i.e., exchange employees are not Federal employees, plaintiff argues that his relationship with the AAFES is contractual, the same as employees in the private sector. He further argues that Congress intended to afford exchange employees relief when it enacted Pub. L. 91–350. Defendant, on the other hand, argues that Pub. L. 91–350 does not confer jurisdiction over plaintiff's claim. This position is based on defendant's characterization of exchange personnel as serving by "appointment" rather than by contract. Defendant also relies on the failure of Congress to expressly include exchange personnel in the 1970 amendment as evidence of the lack of intent to waive sovereign immunity in the instant case.

We agree with plaintiff.

Defendant's assertion that employment with the AAFES does not arise out of a contractual relationship is unfounded. Defendant relies on the fact that employees of the Federal Government generally serve by "appointment" rather than by virtue of a contractual relationship. As early as 1850, the Supreme Court has held that public officers do not have contracts of employment, but are appointed to office. *Butler* v. *Pennsylvania*, 51 U.S. (10 How.) 402 (1850).[5] This "appointment" status has been extended by law to include em-

[5] The rationale for this "appointed" status is that the Government must have the power to change the agents who carry out the public duties, as well as the terms under which they work. *Butler* v. *Pennsylvania*, 51 U.S. (10 How.) 402, 416–17 (1850). *See also Taylor* v. *Beckman*, 178 U.S. 548 (1900); *Crenshaw* v. *United States*, 134 U.S. 99 (1890); *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385 (1868); and *Urbina* v. *United States*, 192 Ct. Cl. 875, 428 F. 2d 1280 (1970).

ployees of the United States who are subject to the laws administered by the Civil Service Commission. *See* 5 U.S.C. §§ 2104, 2105, 3105 (1970). However, defendant's reliance on the "appointed" rationale begs the fundamental question of whether employees of nonappropriated fund instrumentalities are, in fact, Federal employees. If exchange employees are not Federal employees, their status is not controlled by the "appointment" rationale. And, indeed, we have stated in *Keetz, supra*, and reaffirm here, that "an employee of the Exchange Service is not an employee of the United States." *Keetz, supra*, at 207.[6] *See also Gradall, supra; Brummitt* v. *United States*, 165 Ct. Cl. 78, 80, 329 F. 2d 966, 967 (1964).

The employment status of non-Federal employees is governed by the same rules of law applicable to private employer-employee relationships. It is hornbook law that such a relationship is contractual in nature. *Fleming* v. *A. H. Belo Corp.*, 121 F. 2d 207, 214 n. 9 (5th Cir. 1941), *aff'd.* 316 U.S. 624 (1942), *reh. denied*, 317 U.S. 706 (1942); 53 Am. Jur. 2d, Master and Servant, §§ 14, 66 (1970). "It is a fundamental principle of law that the relationship of employer and employee is a relation created by contract, either express or implied." *Ward* v. *Atlantic Coast Line Railroad Co.*, 265 F. 2d 75, 83 (5th Cir. 1959), *rev'd on other grounds*, 362 U.S. 396 (1960). *See also New Amsterdam Cas. Co.* v. *Soileau*, 167 F. 2d 767 (5th Cir. 1948), *cert. denied*, 335 U.S. 822 (1948). It would thus seem clear that plaintiff's employment with the AAFES must be viewed as arising from either an express or implied contract, and we hold accordingly.

Defendant concedes that Pub. L. 91–350 confers jurisdiction over claims concerning exchange type operations founded on contracts. However, defendant argues exchange employee contracts are not the kind of contracts to be covered by the new Act. It maintains that Congress, in determining that jurisdiction should be granted, did not consider whether

[6] In fact, the Government in *Keetz* v. *United States*, 168 Ct. Cl. 205 (1964), argued that an AAFES employee had a contract of employment. We find it a bit ironic that in the instant case, the Government argues just the opposite. We can only assume that this inconsistency has occurred because the enactment of Pub. L. 91–350 now grants jurisdiction for exchange contract claims. We held the Government's contract theory in *Keetz* to be correct and see no reason to change in the instant case.

civilian exchange employees should be permitted to sue for their back pay. Relying on the principle that waivers of sovereign immunity are to be strictly and conservatively construed,[7] the Government argues that the absence of a clear expression of legislative intent to waive immunity against suits by exchange employees is fatal to plaintiff. We find the legislative intent less silent than defendant asserts.

While it is true that no such specific reference can be found, a reading of both the House and Senate Reports accompanying S. 980 clearly reveals that employment cases were considered when both houses spoke of removing a "loophole" [H. R. REP. No. 91-933, 91st Cong., 2d Sess. 2 (1970)] and "filling a gap" [S. REP. No. 268, 91st Cong., 1st Sess. 2 (1969)] in the Tucker Act's waiver of immunity. In both reports, *Kyer, supra; Pulaski Cab Co., supra; Keetz, supra*, and *Borden, supra*, were cited as illustrative of the "loophole" or "gap" to be closed. All four cases relate to claims for pay or personal services as distinguished from claims of supply or construction contractors. We are convinced that correction of the harsh result imposed by the above cases was clearly within the intent of Pub. L. 91-350.

Although this case is one of first impression regarding the effect of Pub. L. 91-350 on exchange activity employee pay cases,[8] we are persuaded that our previous decisions in *Keetz, supra*, and *Gradall, supra*, regarding exchange employees' failure to qualify as Federal employees, coupled with the clear intent of Congress to close the jurisdictional "loophole" in the Tucker Act as it affects exchange employees, mandates denial of defendant's motion to dismiss for want of jurisdiction.

We realize that our holding is in conflict with the recent opinion of Judge Wisdom in *Young* v. *United States*, 498 F. 2d 1211 (5th Cir. 1974). The *Young* court held that Public Law 91-350 does not confer jurisdiction under the Tucker

[7] *King* v. *United States*, 393 U.S. 1 (1969); *Soriano* v. *United States*, 352 U.S. 270 (1957); *United States* v. *Sherwood*, 312 U.S. 584 (1941).

[8] Although this issue was raised in *Travis* v. *United States*, 199 Ct. Cl. 67 (1972), we deferred decision on this difficult jurisdictional question since it was clear in *Travis* that plaintiff had no case on the merits. *See Travis, supra*, n. 1 at 70.

Act to hear exchange employee cases. This result was reached by construing the legislative intent as not "extend[ing] Tucker Act jurisdiction to the sort of 'contract' plaintiff asserts existed in this case." *Young, supra*, at 1217.

The *Young* court viewed the absence of any specific mention of exchange employees in the 1970 amendment as a bar to jurisdiction.[9] The court reasoned that since, on other occasions, Congress had enacted legislation which dealt with exchange employees, in very direct and specific terms, the absence of such language is evidence of an exclusionary intent.

We respectfully differ.

The *Young* court completely overlooked the reference in both the House and Senate reports to cases decided by this court involving exchange employees and the harsh result of our lack of jurisdiction. This specific reference to *Keetz, supra; Pulaski Cab Co., supra; Kyer, supra*, and *Borden, supra*, in our mind, negates any argument that Congress did not intend to cover exchange employee contracts when it enacted Pub. L. 91-350.

* * * * *

We hold that since plaintiff is not a Federal employee, his relationship with the AAFES is governed by contract principles. Thus, this court, by virtue of the 1970 amendment to the Tucker Act, has jurisdiction to grant a money judgment against the United States for an alleged improper discharge of an employee of a nonappropriated fund exchange type instrumentality.

Accordingly, defendant's motion to dismiss is denied, and the case is remanded to the trial division for decision on the merits.

[9] The court in *Young* v. *United States*, 498 F. 2d 1211 (5th Cir. 1974) stated:

"Nowhere in the history of the amendments is there any direct reference to the relationship between the instrumentalities and their employees, much less any language that would support an inference that Congress intended these amendments are as a vehicle for redressing grievances of employees of these instrumentalities as well as settling claims of third parties with whom the instrumentalities contract for goods and services."

Young, supra, at 1215.

SKELTON, *Judge*, dissenting:

I respectfully dissent.This court does not have jurisdiction to hear the merits of this case. The majority would have us take jurisdiction over a type of claim in which the government is immune from suit as sovereign and in which a clear reading of the case law and legislative history of the 1970 amendment to the Tucker Act shows that Congress has not explicitly waived immunity by giving consent to be sued in this kind of case.

The jurisdiction of this court is limited by the Tucker Act to claims "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. * * *" 28 U.S.C. § 1491 (1970). Although this statute might have been interpreted to constitute a waiver of all non-tort money claims, we have limited our jurisdiction to claims in which there exists constitutional or statutory authority mandating Federal compensation either directly or indirectly. *Eastport Steamship Corp.* v. *United States*, 178 Ct. Cl. 599, 372 F. 2d 1002 (1967). With this limitation in mind, we have historically denied jurisdiction to money claims against nonappropriated fund instrumentalities since by their very nature their financial obligations are not obligations of the United States; until the most recent Tucker Act amendment there was no statutory or constitutional authority or mandate for Congress to appropriate funds to pay judgments obtained against nonappropriated fund instrumentalities. *See Dugan* v. *United States*, 34 Ct. Cl 458 (1899); *Williams* v. *United States*, 44 Ct. Cl. 175 (1909); *Kyle* v. *United States*, 46 Ct. Cl 197 (1911); *Woog* v. *United States*, 48 Ct. Cl. 80 (1913); *Kenny* v. *United States*, 62 Ct. Cl. 328 (1926); *Sullivan* v. *United States*, 92 Ct. Cl. 154 (1940); *Borden* v. *United States*, 126 Ct. Cl. 902, 116 F. Supp. 873 (1953); *Pulaski Cab Co.* v. *United States*, 141 Ct. Cl. 160, 157 F. Supp. 955 (1958); *Cockrill* v. *United States*, 155 Ct. Cl. 181, 292 F. 2d. 288 (1961); *Gradall* v. *United States*, 161 Ct. Cl 714, 329 F. 2d 960 (1963); *Keetz* v. *United States*, 168 Ct. Cl. 205 (1964); *Kyer* v. *United States*, 177 Ct. Cl. 747, 369 F. 2d 714 (1966), *cert. denied*, 387 U.S. 929 (1967).

The Supreme Court confirmed the financial independence of nonappropriated fund activities when, in *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1942), it declared the military Exchange Services were federal instrumentalities but limited the implications of this conclusion by stating: "The Government assumes none of the financial obligations of the exchange." 316 U.S. at 485. Unfortunately, the maintaining of sovereign immunity over claims against the Exchange Services created the anomalous situation in which an individual under contract with the Federal Government could bring suit in this court to remedy contractual claims while a similar contractor providing the same services with an Exchange Service such as the Army and Air Force Exchange Service (AAFES), could not. We have often noted the unfairness of this situation, stating in one case:

> We are mindful of the fact that the result reached spells an unduly harsh outcome. Plaintiff has searched in vain for a forum in which the merits of his claim might be aired. We add, though perhaps of little comfort, that the lack of jurisdiction which plaintiff has faced at every turn is a matter which sorely needs congressional correction. [*Kyer* v. *United States*, 177 Ct. Cl. 747, 754, 369 F. 2d 714, 719 (1966), *cert. denied*, 387 U.S. 929 (1967).]

In 1970, the Tucker Act was amended by the Act of July 23, 1970, Pub. L. No. 91-350, 84 Stat. 449, *amending*, 28 U.S.C. § 1491 (1964), [hereinafter P.L. 91-350] to close this apparent "loophole" by adding the following sentence:

> * * * For the purpose of this paragraph, an express or implied *contract* with the Army and Air Force Exchange Service * * * shall be considered an express or implied contract with the United States. [Emphasis supplied.] [28 U.S.C. § 1491 (1970).]

The majority would have us interpret this amendment so as to provide a waiver of sovereign immunity for all claims against the Exchange Services whether they are based on contract, regulation, or Act of Congress. I believe this is an unwarranted interpretation, and if permitted to stand, it would extend our jurisdiction to cover a vast panoply of claims over which Congress never intended to consent to be sued. The language of the amendment is clear on its face,

and, when combined with the prior case law and the legislative history, it is apparent that Congress only intended to extend our jurisdiction to cover contractual claims of third party independent contractors against the Exchange Services and not to AAFES employees' grievances.

In introducing this amendment to the Senate, Senator Tydings described its purpose as follows:

> Mr. President, nonappropriated fund activities are at present an anomaly of the law. When states have attempted to tax or regulate nonappropriated fund activities, these organizations have successfully argued that they are immune from taxation and regulation as instrumentalities of the United States. When sued in foreign courts, nonappropriated fund activities have successfully argued that as instrumentalities of the United States they are not liable to contract suit, except in the courts of the United States. Our own courts have held, and the Justice Department has concurred in such holdings, that employees of nonappropriated fund activities, engaged in the performance of their duties, are employees of the United States, so that the United States is liable, under the Federal Tort Claims Act, for their negligence within the scope of their employment. The United States has, in fact, sued in its own name to enforce contracts entered into by nonappropriated fund activities.
>
> Yet, today, although nonappropriated fund activities are continually identified with their parent department or agency of the United States, *contractors with such activities have found the court room door barred when they allege a breach of a contract by such an activity.* State courts have disclaimed jurisdiction to entertain the claims, holding that the federal courts are the appropriate forum. Both the federal district courts and the U.S. Court of Claims afford no relief because of the alleged loophole in the Tucker Act. Repeatedly, these courts have held that the Tucker Act's waiver of the sovereign immunity of the United States to contract suits is not broad enough to permit the Court of Claims or the U.S. District Court to entertain suits against nonappropriated fund activities. [115 Cong. Rec., Part 3, p. 3162 (1969).] [Emphasis supplied.]

In reporting favorably on S. 980, the Senate bill to amend the Tucker Act, the report of the Senate Judiciary Committee stated:

> S. 980 will fill a gap in the Tucker Act's waiver of immunity of the United States to claims *based upon contracts* with departments or agencies of the Government. The United States is liable in the Court of Claims of the United States and, in appropriate cases, in the district courts of the United States, to suits "upon any express or implied contract with the United States * * *." 28 U.S.C. 1491; 28 U.S.C. 1346(a)(2). The courts have repeatedly held, however, that the Federal Government's liability to suit under these sections *only exists with respect to contract obligations* to be paid out of appropriated funds. See, e.g., *Kyer* v. *United States*, 369 F. 2d 714 (Ct. Claims 1966); *Pulaski Cab Co.* v. *United States*, 157 F. Supp. 955 (Ct. Claims 1968); *Keetz* v. *United States*, 168 Ct. Claims 205 (1964); *Borden* v. *United States*, 116 F. Supp. 873 (Ct. Claims 1953). [S. Rep. No. 268, 91st. Cong., 1st. Sess. 2 (1969)] [Emphasis supplied.]

The House Judiciary Committee also favorably reported the bill and, describing its purpose as closing a "loophole" in the Tucker Act dealing with "claims based upon contracts with departments or agencies of the Government." [2 U.S. Code Cong. & Admin. News 3478 (1970).]

The intention of Congress to close a loophole with respect to contractual claims of third party independent contractors is further substantiated by the floor debate prior to the bill's passage. Speaking for the amendment, Representative Rogers of Colorado stated:

> Under the Tucker Act, the United States has waived its sovereign immunity *with respect to contract claims.* However, the construction given to the Tucker Act by the courts has left a loophole, which creates inequities for some claimants. This loophole exists *with respect to contracts entered into by those Federal instrumentalities* which operate as nonappropriated fund activities. In short, under present construction of the Tucker Act, a plaintiff with a legitimate claim against a nonappropriated fund activity is not entitled to any judicial relief. S. 980 as reported by the Committee on the Judiciary is intended to close this loophole *with respect to contracts* entered into by post exchange types of operations conducted within the Department of Defense and the National Aeronautics and Space Administration. [116 Cong. Rec., Part 8, 10,604–06 (1970)] [Emphasis supplied.]

Similarly, Representative Fish in commenting on the types of problems that necessitated an amendment stated:

> S. 980, as it passed the other body, would close this loophole in the Tucker Act by permitting the aggrieved party to sue the U.S. Government where the gravamen of the complaint *arises from a contract* with a nonappropriated fund activity. Such activity would then have to reimburse the United States for any judgment paid. [*Id.* at 10,605–06] [Emphasis supplied.]

The legislative history speaks clearly and unambiguously. Public Law 91–350 was intended by Congress to waive sovereign immunity solely over claims of third party independent contractors arising as a result of contracts with nonappropriated fund instrumentalities such as the AAFES. The legislative history is silent concerning claims against the AAFES by employees. No reference is made to the lack of a Court of Claims forum for the resolution of pay claims or other employment grievances for AAFES employees. It seems clear to me that Congress did not intend to provide additional remedies for nonappropriated fund instrumentality employees when it passed Pub. L. 9–350; its only aim was to correct an anomalous situation with respect to those third party independent contractors having explicit contracts with the Exchange Services.

Moreover, it is highly relevant to note that the AAFES, alone, had almost 80,000 civilian employees in 1970.[1] Certainly, if Congress planned to give such a vast number of individuals, together with thousands more in the four other Exchange Services, a new forum to present their employment grievances or pay claims, some statement would have been made to that effect by the two Judiciary Committee Reports or during the debates. The absence of such comment is, in my judgment, significant since sovereign immunity cannot be waived by implication, *United States* v. *King*, 395 U.S. 1, 4 (1969), or implied through the construction of an ambiguous statute, *General Mutual Ins. Co.* v.

[1] The five Exchange Services are: Army and Air Force Exchange Service, Navy Exchanges, Marine Corp Exchanges, Coast Guard Exchanges, and Exchange Councils of the National Aeronautics and Space Administration (84 Stat. 449). The record does not show the total number of their employees.

United States, 119 F. Supp. 352 (N.D.N.Y. 1953) as the majority would have us do. Rather, it must be uniquivocally and unambiguously expressed. As the Supreme Court stated:

> * * * We think that this approach runs counter to the settled propositions that the Court of Claims' jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and that *such a waiver cannot be implied but must be unequivocally expressed. United States* v. *Sherwood*, 312 U.S. 584. * * * [Emphasis supplied.] [*United States* v. *King* at 4.]

The majority points to four cases cited by the legislative history, *Kyer* v. *United States*, *supra*; *Pulaski Cab Co.* v. *United States*, *supra*; *Keetz* v. *United States*, *supra*; and *Borden* v. *United States*, *supra*, as evidence of a concern Congress had for employment cases. I do not believe that these cases are illustrative of the point the majority is seeking to make. Each of these cases, with the exception of *Keetz*, *supra*, deals with independent suppliers of goods and services under explicit contract with the Exchange Services, not employees in any traditional sense, and was probably cited in the history merely to show that the doctrine of sovereign immunity stood as a bar against such contractual claims. The last case, *Keetz*, *supra*, although not involving a contract, is, as I will discuss, based on an incorrect reading of Court of Claims precedent.

Since, as the legislative history seems to indicate, Congress intended the amendment to serve as a waiver of sovereign immunity only over contract claims of independent third parties against the AAFES or other Exchange Services, we acquire jurisdiction in this case only if the plaintiff had such a contractual relationship with the AAFES. In reviewing the statutory scheme created by Congress and the case law that has developed since the Supreme Court decided in *Standard Oil Co.*, *supra*, that the AAFES is a federal instrumentality. I am drawn to the conclusion that if an employee of an Exchange Service such as the plaintiff is a federal employee, he is such employee for limited purposes only. He is not an employee of the U.S. Army or Air Force, but only of the Exchange Service. His salary is paid out of

nonappropriated funds over which this court has no jurisdiction. The following cases hold that such Exchange Service employees are federal employees in various situations: *Rizzuto* v. *United States*, 298 F. 2d 748, 749–50 (10th Cir. 1961); *United States* v. *Holcombe*, 277 F. 2d 143 (4th Cir. 1960), *aff'g* 176 F. Supp. 297, 299–300 (E.D. Va. 1959); *United States* v. *Forfari*, 268 F. 2d 29, 31, 35 (9th Cir. 1959), *cert. denied*, 361 U.S. 902; *Daniels* v. *Chanute Air Force Base Exchange*, 127 F. Supp. 920, 923–24 (E.D. Ill. 1955); *Brethauer* v. *United States*, 333 F. 2d 302, 304–06 (8th Cir. 1964); and *Aubrey* v. *United States*, 254 F. 2d 768 (D.C. Cir. 1958). None of these cases involved claims for wrongful discharge or back pay, but dealt with claims of tort, workmen's compensation, criminal law, etc.

In several contexts Congress has explicitly included Exchange Service employees within the rights and benefits extended to other federal employees. Thus, they are eligible for unemployment compensation benefits under 5 U.S.C. § 8501 (1970) as well as coverage under 5 U.S.C. § 7902 (1970), concerning federal safety programs. Similarly, AAFES employees are governed by the dual compensation provision of 5 U.S.C. § 5531 (1970). Where AAFES employees are not to be considered federal employees, Congress has directly and unambiguously so provided. For example, in 5 U.S.C. § 2105(c) it is declared:

> § 2105. Employee.
>
> * * * * *
>
> (c) An employee paid from nonappropriated funds of the Army and Air Force Exchange Service, [AAFES] * * * is deemed not an employee [of the United States] for the purpose of—
>
> (1) laws administered by the Civil Service Commission; or
>
> (2) subchapter I of chapter 81 [dealing with compensation for work injuries] and section 7902 of this title [federal safety programs].

The applicable Army/Air Force Regulation is to the same effect as follows:

> 1–4 Civilian Personnel. a. AAFES personnel are employees of an instrumentality of the United States which is an integral part of the Department of Defense. Since

> they are compensated out of nonappropriated funds, they are distinguished from other civilian employees of the Armed Services who are compensated from appropriated funds. For example, they are not held or considered as employees of the United States for certain purposes, such as the civil service laws and the Federal Employees Compensation Act (5 U.S.C. 2105). [AR 60–20/AFR 147–14, § 1–4 (Oct. 1968)]

Although excluding AAFES employees from the category of federal employees for the purposes of the Civil Service laws, Congress in § 2105 has clearly not precluded these employees from being federal employees for other purposes.

Similarly, the executive branch of government in certain circumstances groups AAFES employees with federal employees. For example, section 2(b) of Executive Order 11491, setting up a program of labor management relations in the federal service, states that employees of nonappropriated fund instrumentalities are to be included.

Case law similarly points to the conclusion that employees of an Exchange Service are federal employees for limited purposes only. In a long line of cases dealing with the Federal Tort Claims Act, 28 U.S.C. § 1346 (1970), the federal courts have considered those employed by the Exchange Service to be federal employees as far as tort claims are concerned. *See e.g.*, *Rizzuto* v. *United States*, *supra*; *United States* v. *Holcombe*, *supra*; *United States* v. *Forfari*, *supra*; and *Aubrey* v. *United States*, *supra*.

In this court the status of an AAFES employee has been dealt with very infrequently. The latest case considering this question was *Keetz* v. *United States*, 168 Ct. Cl. 205 (1964). In *Keetz*, decided before the passage of Pub. L. 91–350, an employee of the AAFES sued here for back salary claiming that the bar in this court against contractual claims with the Exchange Services did not apply since he was a federal employee *and not working pursuant to contract*. Instead, the plaintiff alleged that the gravamen of his complaint was a refusal by the AAFES to comply with regulations due federal employees. This court denied jurisdiction as it had in all the preceding suits involving the AAFES, holding that in "other contexts" the court had held that employees of the AAFES were not federal employees and citing as support

Gradall v. *United States*, 161 Ct. Cl. 714, 329 F. 2d 960 (1963) and *Brummitt* v. *United States*, 165 Ct. Cl. 78, 329 F. 2d 966 (1964). A close reading of those two cases will show that the court erred in relying on them in the *Keetz* case.

In *Gradall*, *supra*, the issue was whether an AAFES employee was a federal employee within the definition of the Dual Compensation Act. The court's holding that he was not a federal employee was merely dicta inasmuch as the written employment contract which defined the plaintiff's relationship stated in part that "although EUCOM exchange system is an instrumentality of the U.S. Government * * * *you are not considered to be a federal employee.*" [161 Ct. Cl. at 718, 329 F. 2d at 963] [Emphasis supplied.] A similar holding in *Brummitt*, *supra* is likewise only dicta, since this court found that the open mess which employed the plaintiff was at the time in issue neither a federal instrumentality nor a nonappropriated fund activity, but rather a private organization, and, therefore, a fortiori, the plaintiff could not be a federal employee. Because of its reliance on the barest form of dicta and its lack of independent analysis, the *Keetz* case in no way prevents the conclusion that the plaintiff is a federal employee, but only for limited purposes not germane here.

Article 2, Section 2 of the Constitution establishes that the only way one can become a federal officer is through appointment by the President or by the "head of a department" or by one to whom the power of appointment has been delegated. In *Crenshaw* v. *United States*, 134 U.S. 99 (1890), the Supreme Court held that even after appointment, a public officer had no vested or contract right in his office. The Court said.

> The primary question in this case, * * * is, whether an officer appointed for a definite time or during good behavior had any vested interest or contract right in his office of which Congress could not deprive him? The question is not novel. There seems to be but little difficulty in deciding that there was no such interest or right. * * * [*Id.* at 104.]

The Court further stated:

> * * * We have already shown, that the appointment to and the tenure of an office created for the public use, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error; do not come within the import of the term *contracts*, or, in other words, the vested, private personal rights thereby intended to be protected. * * * [Emphasis in original.] [*Id.* at 105.]

Again, in *Taylor* v. *Beckham*, 178 U.S. 548 (1900), the Supreme Court repeated its holding of *Crenshaw*, *supra*, and stated: "In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a *contract* right." [Emphasis supplied.] [Footnote omitted.] [*Id.* at 577.]

In *Urbina* v. *United States*, 192 Ct. Cl. 875, 881, 428 F. 2d 1280, 1284 (1970), we held:

> * * * If, * * * plaintiff's reliance is on some theory of contract law, his position would not be improved since it is plain that public employment does not, in a situation such as is here involved, give rise to a contractual relationship in the conventional sense. *Borak* v. *United States*, 110 Ct. Cl. 236, 78 F. Supp. 123, *cert denied*, 335 U.S. 821 (1948). *Cf. Lawrence* v. *United States*, 139 Ct. Cl. 370, 153 F. Supp. 790 (1957) * * *.

See also, *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868).

In my dissent in *Testan* v. *United States*, 205 Ct. Cl. ——, 499 F. 2d 690 (July 1974) *cert. granted*, February 18, 1975, a case in which the majority found that plaintiff had an interest in a job position to which he had not been appointed, I summarized the law saying:

> Article 2, Section 2, of the Constitution provides that officers of the United States shall be appointed by the President or the heads of the departments, as Congress may direct. There is no other way a person can obtain a government job. *See United States* v. *Smith*, 124 U.S. 525 (1888); *United States* v. *Mouat*, 124 U.S. 303 (1888); and *Thomason* v. *United States*, 85 F. Supp. 742 (N.D. Cal. 1948), *aff'd*, 184 F. 2d 105 (9th Cir. 1950). Government employment is not a contract, is not property and the due process clause of the Constitution does not apply. *Bailey* v. *Richardson*, *supra* [182 F. 2d 46 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951)]; *Crenshaw* v. *United States*, 134 U.S. 99 (1890); *Taylor* v. *Beckham*, 178 U.S.

548 (1900); and *Jenson* v. *Olson*, *supra* [353 F. 2d 825 (8th Cir. 1965)]. Since the plaintiffs were never appointed to these jobs, they had no vested or property rights in them. Consequently when they were not promoted, they were not denied anything that they had a right to. [Slip Op. at 5–6, 499 F. 2d at 693.]

Again, in my dissent in *Chambers* v. *United States*, 196 Ct. Cl. 186, 451 F. 2d 1045 (1971), I stated:

> We can conclude from the authorities cited above that a government job is not property, *does not involve contract rights*, but does include, tenure, salary and duties. It can only be conferred by appointment as authorized by Congress. Unless a person has been so appointed, he is not in the government employ and is not a public officer. * * * [*Id.* at 229, 451 F. 2d at 1070.]

I am persuaded by the foregoing authorities that if the plaintiff was a federal employee by reason of his employment by the AAFES, he was such employee for limited purposes only as indicated above and held such employment *by appointment* and *not by a contract* with the Federal Government. Consequently, Pub. L. 91–350 does not apply.

Furthermore, I do not view Pub. L. 91–350 as intending to extend the Tucker Act's waiver of sovereign immunity to include the type of case we have here. A review of the quoted legislative history makes it clear that Congress intended only to remove the existing ban on jurisdiction to hear and decide suits involving contracts entered into by nonappropriated fund instrumentalities for supplies and services other than services of employees, and not as a waiver of sovereign immunity over employment grievances.

In *Young* v. *United States*, 498 F. 2d 1211 (5th Cir. 1974) the fifth circuit considered a case closely analogous to the instant case before us. The plaintiff in *Young* sought review and back salary for action taken by the AAFES discharging him from his position as an architect. He argued, in part, that Pub. L. 91–350 in amending the Tucker Act, 28 U.S.C. § 1346(a)(2) (conferring concurrent jurisdiction on the district court), extended the jurisdiction of the district court to hear his pay case because he had a contract with the Exchange Service. The district court dismissed the suit on the grounds that:

> * * * [T]he plaintiff's employment relationship with the Exchange Service did not constitute a contractual relationship that could give rise to an action under the Tucker Act, * * *. [*Id.* at 1214.]

The Fifth Circuit Court affirmed this action of the district court, thereby holding that the plaintiff did not have a contract with the Exchange Service.[2] The decision of the majority in the instant case that our plaintiff had a contract with the AAFES is in direct conflict on this point with the decision of the Fifth Circuit Court in the *Young* case. The Fifth Circuit Court, in reviewing the legislative history of Pub. L. 91–350 in the *Young* case, denied that the amendment conferred jurisdiction on the federal courts to hear plaintiff's claim, saying:

> * * * In construing the 1970 amendments to the Tucker Act, we cannot ignore the fact that, in the much larger statutory scheme embracing federal employment, Congress has, when it has thought such action appropriate, dealt with Exchange Service employees directly and specifically. In our view, this circumstance, coupled with the dearth of concern with employment relationships in the legislative history of the 1970 amendments, strengthens our conclusion that *those amendments were not intended to extend Tucker Act jurisdiction to the sort of "contract" plaintiff asserts existed in this case.* * * * [498 F. 2d at 1217.] [Emphasis supplied.] [Footnote omitted.]

The *Young* case, being "on all fours" with the instant case on the contract question should stand as clear and convincing precedent for our denial of jurisdiction. Thus, the amendments to the Tucker Act were not intended to waive sovereign immunity over Exchange Service employment grievance cases.

The majority opinion goes against the plain language of the amendment, clear legislative history and convincing case precedent.

In any event, the plaintiff cannot recover under the theory advanced by the majority opinion to the effect that he is "governed by the same rules of law applicable to private

[2] The district court decision was reversed and plaintiff was granted a new trial on other grounds.

employer-employee relationships" which "is contractual in nature." If this is true, the plaintiff could only claim that he had been hired for an indefinite time for personal services. It is well settled in the law applicable to private employer-employee relationships that a hiring of an employee by an employer that is indefinite as to time is not enforceable and is terminable at the will of either party at any time without liability. *See* 1 Williston, Contracts § 39 (1957), where it is stated:

> * * * [I]t is generally held that a hiring indefinite as to time is terminable at the will of either party and therefore creates no executory obligations. * * * [Footnote omitted.] [Id. at 119, Third Edition (Jaeger).]

In *Atchison, T. & S.F. Ry.* v. *United States*, 211 F. 2d 264 (10th Cir. 1954), the court said:

> * * * It is the well settled rule that a contract providing solely and exclusively for the rendition of personal services, fixing no period of time during which it shall be in force and effect, and failing to specify that a certain amount of work shall be performed under its terms, is terminable at the will of either party. * * * [Many cases cited.] [*Id.* at 265.]

See also Fibreboard Products, Inc. v. *Townsend*, 202 F. 2d 180 (9th Cir. 1953), where the court held:

> A contract for permanent employment is only a contract for an indefinite period of time and terminable at the will of either party, * * *. [*Id.* at 182.]

This is undoubtedly the general rule governing private employer-employee contractual relationships. Under the theory of the majority, all that the plaintiff had was employment that could be terminated at will by him or the AAFES without liability. The AAFES terminated the employment. The plaintiff has no rights under the Civil Service laws or regulations and by statute no protection under the Lloyd-La Follette Act, 5 U.S.C. § 7501 (1970), which provides that:

> § 7501. Cause; procedure; exception.
> (a) An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.

Therefore, plaintiff has not alleged a claim on which relief can be granted. In short, plaintiff has not alleged a cause of action even under the theory of the majority and his petition should be dismissed. *See Price* v. *United States*, 65 Ct. Cl. 91 (1928), *cert. denied*, 277 U.S. 587; and *Barea* v. *United States*, 115 Ct. Cl. 44 (1949).

In summary, it makes no difference whether plaintiff was a federal employee for limited purposes because of his appointment to a position by the Exchange Service, or whether he was a private employee of the Exchange Service with a private industry employer-employee type contract for personal services for an indefinite period of time, because this court has no jurisdiction to entertain his employment grievance in either case. If he was a federal employee for limited purposes because of his appointment to a position by the Exchange Service, he had no contract and Pub. L. 91-350, *supra*, does not confer jurisdiction on this court to hear his case. If he was a private employee of the Exchange Service and held a private industry type of employment contract for indefinite personal services, as the majority holds, when the Exchange Service terminated his employment, which it had a right to do without liability, all of his contract rights were also terminated and he has no claim on which relief can be granted. Furthermore, plaintiff's salary was being paid out of nonappropriated funds over which we have no jurisdiction. See the many cases cited above.

In any event, the plaintiff does not have a third party independent contract claim, being the only kind of contract claim as to which Congress waived sovereign immunity to suit when it enacted Pub. L. 91-350. The United States is immune from suit on all other nonappropriated fund claims including that of the plaintiff in this case.

The plaintiff cites *Service* v. *Dulles*, 354 U.S. 363 (1957) in support of his position. That case is clearly inapplicable. The plaintiff there was a regular foreign service officer of the Department of State whose salary was paid out of appropriated funds. The court held that he was improperly discharged because the regulations of the department were not followed. By contrast, the plaintiff in the instant case was not an employee of the Air Force or of the Army whose

salary was paid out of appropriated funds, but was an employee of a nonappropriated fund instrumentality and received his pay from nonappropriated funds. The cases are clearly distinguishable.

The plaintiff also cites *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), in support of his claim. That case is of no help to him. The facts are quite different and the cases are easily distinguishable. In that case the plaintiff was an employee of the Department of Interior. He was what is known as a Schedule A employee (*i.e.*, one occupying positions other than those of a confidential or policy-determining character) in the excepted service. *His salary was paid out of appropriated funds.* He had no civil service protected status and could have been discharged summarily without any reasons being given. However, the Secretary discharged him on security reasons invoking department regulations to do so, but he did not follow the regulations. The court held that since the Secretary gratuitously invoked the regulations, he was required to follow them and having failed to do so, the discharge was unauthorized. This is a highly technical point not involved in our case. That case is distinguished from the instant case because there the plaintiff was an employee of the Department of the Interior and his salary was paid out of appropriated funds. Whereas, in our case, the plaintiff was not an employee of any executive department, but was an employee of a nonappropriated fund instrumentality of the government and *his salary was paid out of nonappropriated funds.* The crucial fact is that here plaintiff was paid out of nonappropriated funds. This brings us back to the starting point that prior to the 1970 amendment of the Tucker Act (28 U.S.C. § 1491) it was universally held that courts had no jurisdiction of claims of employees of nonappropriated fund instrumentalities of the government. See cases cited above. In 1970 the Tucker Act was amended giving this court jurisdiction of cases founded upon any express or implied contract with the United States by reason of any such contract with any of the Exchange Services. Therefore, the sole question in this case is whether or not plaintiff had a contract within the meaning of the 1970 amendment. I have already demonstrated that this was not the case whether plaintiff was a federal em-

ployee or was a private employee of the Exchange Service. In my opinion, there is no way that plaintiff can bring his claim within the meaning of the 1970 amendment so as to confer jurisdiction on this court to entertain his suit.

For all of the reasons set forth above, the court should either grant defendant's motion and dismiss plaintiff's petition on the ground we do not have jurisdiction of his claim, or, without reaching the jurisdiction issue, dismiss plaintiff's petition because he has not alleged a claim on which relief can be granted, which was the course we followed in the cases of *Travis* v. *United States*, 199 Ct. Cl. 67 (1972); and *Monett* v. *United States*, 190 Ct. Cl. 1, 5 n. 4, 419 F. 2d 434, 436 (1969), *cert. denied*, 400 U.S. 846 (1970). *See also*, *Brooks* v. *Dewar*, 313 U.S. 354, 359–60 (1941); and *Flanigan* v. *United States*, 142 Ct. Cl. 600 (1958).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-246

UNITED STATES OF AMERICA, *Petitioner*

v.

ROY C. HOPKINS, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Claims

---

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
LEGISLATIVE HISTORY	7
ARGUMENT IN OPPOSITION TO PETITION:	
Summary	9
1. Exchange Service Employment Is Contractual	10
2. Legislative History of 1970 Amendment	11
3. Fifth Circuit "Conflict"	12
CONCLUSION	14

TABLE OF CITATIONS

CASES:

Borden v. United States, 126 Ct. Cl. 902, 116 F. Supp. 873 (1953)	4, 5, 8
Brethauer v. United States, 333 F.2d 302 (8th Cir. 1964)	4
Eastport Corp. v. United States, 178 Ct. Cl. 599, 372 F.2d 1002 (1967)	5
G. L. Christian and Associates v. United States, 160 Ct. Cl. 1, 312 F.2d 418 (1963)	5
Keetz v. United States, 168 Ct. Cl. 205 (1964)	4, 6, 8
Kyer v. United States, 177 Ct. Cl. 747, 369 F.2d 714 (1966)	4, 6, 8
Pulaski Cab Co. v. United States, 141 Ct. Cl. 160, 157 F. Supp. 955 (1958)	4, 5, 8
Standard Oil Co. of Calif. v. Johnson, 316 U.S. 481, 86 L.Ed. 1611 (1942)	4, 11
United States v. Holcombe, 277 F.2d 143 (4th Cir. 1960)	4
United States v. Howell, 318 F.2d 162 (9th Cir. 1963)	4
Young v. United States, 498 F.2d 1211 (5th Cir.)	12

	Page
STATUTES:	
5 U.S.C. 701 *et seq.*	13
5 U.S.C. 2105(c)	11
28 U.S.C. 1255(1)	2
28 U.S.C. 1346(a)(2)	2
28 U.S.C. 1491	2, 3
P.L. 91-350, 84 Stat. 449	2, 3
LEGISLATIVE HISTORIES:	
Hearings on S. 980 Before the Subcommittee on Improvements in Judiciary Machinery of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. (1969)	7
Hearings on S. 3163 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 90th Cong., 2d Sess. (1968)	7
Senate Report No. 268, 91st Cong., 2d Sess. (1969) (Libr. Cong. 1-2: 12834-2)	8
Hearings on S. 980 Before Subcommittee No. 4 of the House Committee on the Judiciary, 91st Cong., 1st Sess., Ser. 4 (1969)	8
H.R. Rep. No. 91-933, 91st Cong., 2d Sess. (1970) 2 U.S. Code Cong. & Admin. News 1970	9
H.R. No. 1995, 82d Cong., 2d Sess. 2 U.S. Code Cong. & Admin. News 1952	11
MISCELLANEOUS:	
53 Am. Jur. 2d, Master and Servant, § 14	10

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---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-25a) is reported at 206 Ct. Cl. 303, 513 F.2d 1360.

JURISDICTION

The judgment of the Court of Claims was entered on March 19, 1975. The petition for writ of certiorari was filed on August 15, 1975, within time as extended. Ju-

risdiction of this Court has been invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether this Court should review a decision of the Court of Claims holding that that Court has jurisdiction to entertain a claim against the United States for the improper discharge of an employee of the Army and Air Force Exchange Service.

STATUTE INVOLVED

The Tucker Act, 28 U.S.C. 1491, provides in pertinent part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. *For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. . . .*

The italicized language was added in 1970 by Pub. L. 91-350, 84 Stat. 449, which amendment is the subject of the petition herein.[1]

[1] Pub. L. 91-350 also added the identical language to 28 U.S.C. 1346(a)(2), which grants the District Courts concurrent jurisdiction with the Court of Claims for claims not in excess of $10,000.

STATEMENT OF THE CASE

On August 6, 1968, respondent[2] was discharged from his position as a civilian employee of the Army and Air Force Exchange Service for alleged acts of misconduct.

Respondent filed suit in the Court of Claims to recover back pay from the United States on the grounds his discharge (1) was arbitrary and capricious, (2) was a breach of his contract of employment, and (3) was in violation of due process and of prescribed regulations and procedures. Jurisdiction was asserted under the Tucker Act, 28 U.S.C. 1491, which provides jurisdiction over claims founded upon express or implied contracts with the United States, or founded upon the Constitution, any Act of Congress, or any regulation of an executive department.

The government moved below to dismiss on the procedural ground that no claim stated was within the jurisdiction of the Court of Claims because (1) respondent as a military exchange service employee was not a "federal" employee and therefore was not entitled to judicial review of his discharge, and (2) respondent's exchange employment was not based on an express or implied contract and therefore respondent did not have a contract claim. The denial of the motion is the subject of the pending petition.

In 1970, the Tucker Act, which is the jurisdictional statute for the Court of Claims, was amended. Pub. L. 91-350, 84 Stat. 449. Prior thereto that Court had re-

[2] Respondent died on June 7, 1974. His widow has initiated probate proceedings in California and upon appointment will be substituted as party plaintiff pursuant to Rule 66(a) of the Court of Claims.

jected jurisdiction of claims arising from transactions by claimants with military exchanges and other non-appropriated fund instrumentalities of the United States on the theory the United States had not assumed responsibility for obligations of those instrumentalities and therefore had not waived sovereign immunity in respect to such claims.[3]

In all other legal areas, however, the military exchanges and certain other non-appropriated fund instrumentalities had been treated for jurisdictional purposes as full agencies of the federal government.[4]

The genesis of the Court of Claims non-jurisdiction holdings was *Standard Oil Company of California* v. *United States,* 316 U.S. 481, 86 L. ed. 1611 (1942), wherein it was held that military post exchanges are "arms of the government." *Id.* at 485. However, the Court also said the "government assumes none of the financial obligations of the exchange." *Id.* at 485.

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[3] *Borden* v. *United States,* 126 Ct. Cl. 902, 116 F. Supp. 873 (1953); *Pulaski Cab Company* v. *United States,* 141 Ct. Cl. 160, 157 F. Supp. 955 (1958); *Keetz* v. *United States,* 168 Ct. Cl. 205 (1964); *Kyer* v. *United States,* 177 Ct. Cl. 747, 369 F. 2d 714 (1966).

[4] Thus, the United States is the proper party to sue in contract and to recover on behalf of an exchange. *United States* v. *Howell,* 318 F. 2d 162 (9th Cir. 1963) The United States may prosecute for the filing of a false statement with the exchange service under a statute prohibiting the uttering of such a statement to an agency of the United States. *Brethauer* v. *United States,* 333 F. 2d 302 (8th Cir. 1964) And it is well established that the waiver of tort liability under the Federal Tort Claims Act extends to negligence of exchange service employees although the statute refers only to the employees of the government. *United States* v. *Holcombe,* 277 F. 2d 143 (4th Cir. 1960).

The non-assumption of financial obligations prompted the Court of Claims to reject jurisdiction over non-appropriated fund instrumentalities in light of that Court's doctrine that jurisdiction under the Tucker Act extends only to claims where there exists constitutional or statutory authority mandating federal compensation expressly or by implication.[5] There being no financial obligation, and thus no mandated compensation, there is no jurisdiction. *G. L. Christian and Associates* v. *United States,* 160 Ct. Cl. 1, 312 F.2d 418 (1963), *cert. denied.* 375 U.S. 954 (1963).

There were four controlling cases prior to the 1970 Tucker Act amendment wherein jurisdiction over non-appropriated fund instrumentalities was rejected in accordance with the above cited doctrine and they are especially important because the legislative history of the amendment, discussed hereafter, establishes that it was Congress' specific and singular purpose to overcome those four particular cases:

(1) *Borden* v. *United States,* 126 Ct. Cl. 902, 116 F. Supp. 873 (1953): jurisdiction rejected in claim by Army and Air Force Exchange Service employee to recover salary allegedly improperly withheld. The Court noted:

> "We think it proper that this situation [lack of jurisdiction] should be called to the attention of the Congress." (*Id.* at 909)

(2) *Pulaski Cab Company* v. *United States,* 141 Ct. Cl. 160, 157 F.Supp. 955 (1958): jurisdiction rejected

---

[5] This doctrine is spelled out most thoroughly in *Eastport* v. *United States,* 178 Ct. Cl. 599, 372 F.2d 1002 (1967), involving the Maritime Commission.

in claim of proprietor of cab service to Fort Leonard Wood Post Exchange for ten percent of agreed upon gross receipts.

(3) *Keetz* v. *United States,* 168 Ct. Cl. 205 (1964): jurisdiction rejected in claim of Army and Air Force Exchange Service employee for improper discharge in violation of Air Force regulations. The Court noted:

> ".....it is up to Congress to remedy this apparent harsh result, and the Courts should refrain from legislating by judicial fiat." *Id.* at 207.

(4) *Kyer* v. *United States,* 177 Ct .Cl. 747, 369 F.2d 714 (1966): jurisdiction rejected in claim to recover brokerage commission for services to an Executive branch committee not supported by appropriated funds. The Court noted:

> "We are mindful of the fact that the result reached spells an unduly harsh outcome. Plaintiff has searched in vain for a forum in which the merits of his claim might be aired. We add, though perhaps of little comfort, that the lack of jurisdiction which plaintiff has faced at every turn is a matter *which sorely needs Congressional correction.*" *Id.* at 754 (Italics supplied)

All four cases relate to claims for pay or personal services as distinguished from claims of supply or construction contractors. *Borden* and *Keetz* were employee claims, *Kyer* was a personal claim for brokerage commission, and only *Pulaski* involved a commercial type contract and even that was for services rather than supply or construction.[6]

[6] Petitioner's footnote 9 (Pet. 8) states one case (*Keetz*) involved an employee claim and "all other cases cited in the legislative history dealt with independent contractors, not employees." This is erroneous and misleading. The cases cited in the legislative history pertinent to the jurisdictional problem with which Congress was concerned are the four set forth above, other citations in the history being to collateral matters. Two of the named four involved pay claims of employees.

LEGISLATIVE HISTORY

The 1970 amendment to the Tucker Act arose from S. 980 (84 Stat. 449). Senator Tydings opened hearings on S. 980 with the comment "the present immunity from contract suit afforded non-appropriated fund activities was an anomaly of the law which needed to be changed."[7] Senator Hruska stated "[T]he purpose of this bill is to fill a loophole."[8]

The predecessor bill to S. 980 was S. 3163, for which hearings were also held.[9] The Chairman of the House Committee on the Armed Forces testified in support of the bill because, he stated, it is ".... a necessary measure to correct a jurisdictional gap in the Tucker Act."[10]

Chief Judge Cowen of the Court of Claims supported S. 3163 as follows:

> "As you know, in the several cases involving non-appropriated fund activities which the Court of Claims has been compelled to dismiss because of lack of jurisdiction the Court in each case pointed out the need for legislation to bridge this

[7] Hearings on S. 980 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. (1969) at 1.

[8] *Id.* at 6.

[9] Hearings on S. 3163 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 90th Cong., 2d Sess. (1968).

[10] *Id.* at 84.

curious, this anomalous, this unwarranted gap in the law.

So, I can sum up quickly, Mr. Chairman, by saying that the judges of the Court of Claims are unanimously in favor of the legislation, and *that we have no suggestions for any changes or amendments.*" [11] (Emphasis supplied)

The Senate Judiciary Committee, in Senate Report No. 268, reported favorably on S. 980, stating the need and purpose to be as follows:

". . . . The Courts have repeatedly held, however, that the Federal Government's liability to suit under these sections only exists with respect to contract obligations to be paid out of appropriated funds. See, *e.g., Kyer* v. *United States,* 369 F.2d 714 (Ct. Claims 1966); *Pulaski Cab Company* v. *United States,* 157 F.Supp. 955 (Ct. Claims 1968); *Keetz* v. *United States,* 168 Ct. Claims 205 (1964); *Borden* v. *United States,* 116 F. Supp. 873 (Ct. Claims 1953). . . .

The injustice and inequity involved by this Tucker Act "loophole" have been recognized often. See *e.g., Borden* v. *United States,* 116 F. Supp. 873, 878-880 (Ct. Claims 1953)." [12]

On the House side hearings were held on S. 980.[13] The House Judiciary Committee reported favorably, setting forth the need and purpose of the bill in the same language used in Senate Report No. 268 except for the use of "loophole" in lieu of "gap" in reference

[11] *Id.* at 193-194.

[12] S. Rep. No. 268, 91st Cong., 1st Sess. (1969)) (Libr. Cong. 1-2: 12834-2) at 2.

[13] Hearings on S. 980 Before Subcommittee No. 4 of the House Committee on the Judiciary, 91st Cong., 1st Sess., Ser. 4 (1969).

to the jurisdictional hiatus.[14] The four key cases, *Borden, Pulaski, Keetz* and *Kyer,* were again cited as the parameters of the jurisdictional "loophole." [15]

ARGUMENT

Summary

Employees of the military exchange services, now numbering some 100,000 (Pet. 5), have in the past been jurisdictional pariahs, deprived of right to judicial remedy for their claims as a result of a "loophole" or "gap" in the law formed by four key cases, *Borden, Pulaski, Keetz* and *Kyer.* On the urging of the Court of Claims, Congress undertook to close the "loophole" or "gap" and did so on the premise that such employees were contractual rather than "federal" employees. Petitioner now argues, in reversal of position in the key cases, that exchange service employees are not contractual, nor are they "federal", but rather are in an intermediate status, one unfounded in legal precedents, and that therefore the jurisdiction loophole or gap has not been closed.

The Court of Claims was correct in continuing established precedent that exchange service employees are contractual and, if so, this ends the matter. Even if not, however, Congress intended to close the "loophole" or "gap" and has effectively erased the prior basis for rejecting jurisdiction over such employees' claims.

The Court of Claims is the expert court on the jurisdictional issues involved and its decision corrects a longstanding injustice, as Congress directed be done.

[14] H.R. Rep. No. 91-933, 91st Cong., 2d Sess. (1970), 2 U.S. Code Cong and Admin. News 1970.

[15] *Id.* at 2.

There is no legal issue here warranting review by this Court.

1. Exchange Service Employment Is Contractual

Petitioner argues the lower court's fundamental error was holding that exchange service employees enjoy a contractual relationship with the employer. (Pet 6) Petitioner is on the horns of a dilemma. Unquestionably there would be jurisdiction if respondent was a "federal" employee or if, on the other hand, he had an express or implied employment contract. Consequently, petitioner argues respondent was in neither status but in an undefined intermediate one, unfounded in judicial decisions or legal treatises, wherein he had no rights at all.[16]

Petitioner cites government regulations whereby employment of an exchange employee is referred to as "appointment" but the regulations cited also use the words "employ", "employment", and "employee", as well. The words "employ" and "appoint" can be and are used interchangeably in and out of government. Petitioner has always insisted, and continues to, that an exchange employee is not a "federal" employee. It is hornbook law that, except for federal and other public employees, the relationship of employer and employee is contractual. 53 Am. Jur. 2d, Master and Servant, § 14.

The Court of Claims has consistently held that an exchange service employee has a contractual relationship and is not a "federal" employee. (See the Court's

[16] The Court of Claims rejected petitioner's argument and stated that an exchange service employee must be either a federal employee or a contractual employee. (Pet. App. 7a)

discussion of said holdings at Pet. App. 6a-7a.) These holdings were in accord with petitioner's prior position before that Court; and in this case the Court noted petitioner's sudden change of position:

> "We find it a bit ironic that in the instant case, the Government argues just the opposite. We can only assume that this inconsistency has occurred because the enactment of Pub. L. 91-350 now grants jurisdiction for exchange contract claims. We hold the Government's contract theory in *Keetz* to be correct and see no reason to change in the instant case." [17] (Pet. App. 7a, fn. 6)

2. Legislative History of 1970 Amendment

Petitioner argues that in the 1970 amendment to the Tucker Act, Congressional concern focused upon claims under contracts for construction, supplies, or services. The legislative history cited definitely does not support this but reflects that Congress referred simply to contracts, and that Congress was well aware of employee claims.

[17] Petitioner's unexplained reversal of position is inconsistent with the position held in the past by the Civil Service Commission. After *Standard Oil Company of California* v. *Johnson, supra,* legislation was proposed (enacted and now 5 U.S.C. § 2105(c)), and the Chairman of the Commisison submitted its position to Congress by letter dated July 23, 1951, addressed to the Hon. Tom Murray:

> "Based upon early decisions of the Court of Claims, and decisions of the accounting officers of the Government, the Commission determined that employees of post exchanges were not Government employees in the executive service but were employees of the exchanges *working under what amounted to a private contract of employment.* This ruling was followed prior to a decision of the Supreme Court of the United States concerning the status of Army post exchanges (*Standard Oil Company* v. *Johnson*, 316 U.S. 418, decided June 1, 1942)." H.R. No. 1995, 82d Cong., 2d Sess., U.S. Code Cong. & Adm. News 1952, p. 1523. [Italics supplied]

The history establishes that the parameters of the "loophole" or "gap" which Congress undertook to fill by the 1970 amendment were formed by *Borden, Pulaski, Keetz* and *Kyer*. Two were employee cases and two were for personal services. None was for supply or construction. Respondent knows of no explicit reference by Congress to supply or construction contracts.

Congress does not refer to employees explicitly but it had no need to. Two of the four cases not only were employee cases but informed Congress that according to *stare decisis* exchange service employees were contractual rather than "federal" employees.

The government did not inform Congress that it no longer considered exchange employees not to be contractual or that they would not be covered by the pending amendment.

Thus, Congress had before it a "loophole" or "gap" in jurisdiction illustrated by employee and personal service claims which had been judicially determined to be contract claims. In any event, Congress articulated clearly its intent to close completely the "loophole" or "gap", and the Court of Claims has recognized this as it was obligated to do. Petitioner should not be heard to reverse its position in order "to create loopholes through which clever defendants may ultimately retreat into the anachronism of government immunity that the bill seeks to eradicate," a development the Senate emphatically hoped to prevent. Senate Report No. 268, *supra.*, at 6.

3. The Fifth Circuit "Conflict

Petitioner contends *Young* v. *United States*, 498 F. 2d 1211 (5th Cir. 1974), "is a decision in conflict." This

is not entirely so. The Fifth Circuit held jurisdiction *did* exist on the grounds a discharge in violation of military regulations governing exchange service employees would be a violation of due process subject to review under the Administrative Procedure Act. (5 U.S.C. 701 *et seq.*) It rejected jurisdiction under the Tucker Act because of a purported absence in the 1970 amendment or its legislative history to specific reference to employee claims.

The Fifth Circuit is no doubt correct in holding that the Administrative Procedure Act is applicable but it is unfortunate that the Fifth Circuit's *Young* case predated the Court of Claims decision in the present case. The Court of Claims commented on the *Young* decision's rejection of the Tucker Act amendment:

> "We respectively differ.
>
> The *Young* court completely overlooked the reference in both the House and Senate reports to cases decided by this Court involving exchange employees and the harsh result of our lack of jurisdiction. This specific reference to *Keetz, supra; Pulaski Cab Company, supra; Kyer, supra;* and *Borden, supra,* in our mind, negates any argument that Congress did not intend to cover exchange employee contracts when it enacted Pub. L. 91-350." (App. 9a)

It would appear that the Fifth Circuit did not have before it an adequate exposition of the legislative history.

CONCLUSION

A writ of certiorari should not be issued because the Court of Claims decision relates to a legal area peculiarly within that Court's cognizance, is based on long established precedents which petitioner itself has heretofore advanced in the courts, carries out the Congressional intent of the 1970 amendment to the Tucker Act, and there is no legal issue warranting review by this Court.

THOMAS H. MCGRAIL
Attorney for Respondent

September 9, 1975

Supreme Court, U. S.
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v.

ROY C. HOPKINS

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BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	3
Summary of argument	5
Argument:	
The Court of Claims does not have jurisdiction to entertain a suit against the United States for damages for the improper discharge of an employee of a military exchange	8
A. Congress did not intend to affect the substantive rights of employees of military exchanges when it amended the Tucker Act	14
B. Employees of military exchanges are federal employees who hold their positions not by express or implied contract but by appointment	20
Conclusion	25
Appendix A	1A
Appendix B	18A
Appendix C	33A

597-252—75——1

CITATIONS

Cases:

	Page
Algonac Manufacturing Co. v. *United States*, 192 Ct. Cl. 649, 428 F. 2d 1241	23
Borden v. *United States*, 126 Ct. Cl. 902, 116 F. Supp. 873	13, 21
Bramlett v. *Desobry*, 490 F. 2d 405, certiorari denied, 419 U.S. 872	18
Crenshaw v. *United States*, 134 U.S. 99	8, 23
Daniels v. *Chanute AFB Exchange and United States*, 127 F. Supp. 920	22
Eastport S.S. Corp. v. *United States*, 178 Ct. Cl. 599, 372 F. 2d 1002	6, 10, 11
Edelstein v. *South Post Officers Club*, 118 F. Supp. 40	13
Finn v. *United States*, 123 U.S. 227	11
Glidden Co. v. *Zdanok*, 370 U.S. 530	10
Grant v. *United States*, 162 F. Supp. 689	22
Jaeger v. *United States*, 394 F. 2d 944	13
J. C. Pitman & Sons, Inc. v. *United States*, 161 Ct. Cl. 701, 317 F. 2d 366	23
Keim v. *United States*, 177 U.S. 290	24
Keetz v. *United States*, 168 Ct. Cl. 205	17, 21
Kyer v. *United States*, 177 Ct. Cl. 747, 369 F. 2d 714	13
Luckenbach S.S. Co. v. *United States*, 272 U.S. 533	9
McTiernan v. *Gronouski*, 337 F. 2d 31	25
Munro v. *United States*, 303 U.S. 36	11
Nimro v. *Davis*, 204 F. 2d 734	13
Porter v. *United States*, 204 Ct. Cl. 355, 496 F. 2d 583	23
Pulaski Cab Company v. *United States*, 141 Ct. Cl. 160, 157 F. Supp. 955	13

Cases—Continued

	Page
Richardson v. *Morris*, 409 U.S. 464	17
Rizzuto v. *United States*, 298 F.2d 748	22
Sampson v. *Murray*, 415 U.S. 61	23, 24
Service v. *Dulles*, 354 U.S. 363	25
Soriano v. *United States*, 352 U.S. 270	9
Standard Oil Co. v. *Johnson*, 316 U.S. 481	3, 9
Swiff-Train Co. v. *United States*, 443 F.2d 1140	13
Taylor v. *United States Civil Service Commission*, 374 F.2d 466	25
Taylor and Marshall v. *Beckham*, 178 U.S. 548	8, 22–23
United States v. *Forfari*, 268 F. 2d 29	22
United States v. *Holcombe*, 277 F.2d 143	22
United States v. *Jones*, 131 U.S. 1	10
United States v. *King*, 395 U.S. 1	5, 9, 10
United States v. *Shaw*, 309 U.S. 495	9, 11
United States v. *Sherwood*, 312 U.S. 584	9, 18
United States v. *Testan and Zarrilli*, No. 74–753, argued November 12, 1975	10–11
United States v. *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506	11
Urbina v. *United States*, 428 F. 2d 1280	23
Vitarelli v. *Seaton*, 359 U.S. 535	25
Young v. *United States*, 498 F. 2d 1211	17, 18, 20

Statutes, regulations and rule:

Back Pay Act, 5 U.S.C. 5596	12
Lloyd-LaFollette Act, 5 U.S.C. 7501	7, 12
Longshoremen's and Harbor Workers' Compensation Act, 5 U.S.C. 8171(b)	12
Social Security Act, as added, 60 Stat. 979, and amended, 42 U.S.C. 410(a)(6)(B)(iv)	8, 12
Tucker Act, 28 U.S.C. 1491, as amended, 84 Stat. 449	2, 5, 9–10, 14, 17

Statutes, regulations and rule—Continued — Page
5, U.S.C. (Supp. III) 2105(c) — 6, 12, 1A
5 U.S.C. 8171(b) — 7, 12
5 U.S.C. 8501(1)(E) — 8, 12
10 U.S.C. 3012 — 3
10 U.S.C. 8012 — 3
28 U.S.C. 1346(a)(2) — 2, 18
29 U.S.C. 201, *et seq.* — 12
5 C.F.R. 554.1–554.15 — 3
32 C.F.R. 554.2(a) — 1A
32 C.F.R. 554.4 — 1A–2A
32 C.F.R. 554.5 — 2A–3A
32 C.F.R. 554.6 — 3A
32 C.F.R. 554.11 — 3A
Army Regulation No. 60–21/Air Force Regulation No. 147–15 (November 12, 1974): — 3, 8, 11
Chapter 1:
Section I: Para. 1–7 — 21, 3A
Section II: Para. 1–9 — 21, 24, 3A–4A
Section III:
Para. 1–13 — 22, 4A
Para. 1–17 — 22, 4A
Para. 1–21 — 22, 5A
Para. 1–22 — 22, 5A
Chapter 2:
Section I:
Para. 2–2 — 21, 5A
Para. 2–3 — 21, 5A–6A
Section II: Para. 2–12 — 22, 24, 6A
Chapter 3:
Section I: — 23
Para. 3–4 — 22, 6A
Para. 3–8 — 6A
Chapter 4:
Section II: Para. 4–19 — 22, 24, 7A–8A

Statutes, regulations and rule—Continued — Page
Army Regulation No. 60–21/Air Force Regulation No. 147–15 (May 14, 1959) — 21
Chapter 1
Section I: Para. 7 — 18A–19A
Section II: Para. 11 — 19A–20A
Section III: Para. 25 — 20A
Section VI: Para. 48 — 20A–24A
Chapter 5
Section IV:
Para. 92 — 24A
Para. 93 — 24A
Para. 94 — 25A–26A
Para. 95 — 26A–27A
Para. 96 — 4, 27A–28A
Para. 97 — 4, 28A
Para. 98 — 4, 28A
Para. 99 — 4, 29A–31A
Para. 100 — 4, 31A–32A
Para 101 — 32A
Exchange Service Bulletin No. 247 (15–52) (July 2, 1975): — 4, 23
Paragraph:
20 — 4, 15A
21 — 4, 16A
22 — 4, 16A
81–88 — 8A–11A
89 — 4, 11A–12A
90–95 — 12A–14A
95c — 4, 14A
96–97 — 14A
97a — 4, 14A
98 — 4, 15A
Rules of the United States Court of Claims, Rule 66(a)(1) — 4

Miscellaneous: Page
8 Air Force JAG Law Review (1966)---------- 3
115 Con. Rec. 3162 (1969)---------- 15
Hearings on S. 980 before Subcommittee No. 4 of the House Committee on the Judiciary, 91st Cong., 1st Sess. (1969)- 7, 15, 16
H.R. Rep. 91-933, 91st Cong., 2d Sess. (1970) ---------- 7, 15
Scolnick and Packer, *Evolution of the Army and Air Force Exchange Service,* 8 Air Force JAG Law Review 19 (Sept.-Oct. 1966)---- 3
S. 980, 91st Cong., 1st Sess. (1969)------ 15, 16
S. Rep. No. 91-268, 91st Cong., 1st Sess. (1969) ---------- 3, 7, 15, 16

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-246

UNITED STATES OF AMERICA, PETITIONER

v.

ROY C. HOPKINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (Pet. App., pp. 1a-25a) is reported at 513 F. 2d 1360.

JURISDICTION

The judgment of the Court of Claims (Pet. App., p. 9a) was entered on March 19, 1975. On June 11, 1975, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 16, 1975. The petition was filed on August 15, 1975, and was granted on October 6, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims has jurisdiction to entertain a suit against the United States for money damages for the improper discharge of an employee of a military exchange.

STATUTES AND REGULATIONS INVOLVED

The Tucker Act, 28 U.S.C. 1491, as amended by Pub. L. 91–350, 84 Stat. 449, provides in pertinent part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.[1]

The other pertinent statutes and regulations are set forth in Appendices A and B to this brief, *infra,* pp. 1A–32A.

[1] The final sentence quoted above was added by Pub. L. 91–350 in 1970. Pub. L. 91–350 also added the identical language to 28 U.S.C. 1346(a)(2), which grants the district courts concurrent jurisdiction with the Court of Claims for claims not exceeding $10,000.

STATEMENT

On April 18, 1958, respondent was appointed to a civilian position with the European Exchange System of the Army and Air Force Exchange Service, a nonappropriated fund instrumentality (App. C, *infra,* pp. 33A–34A).[2] On August 6, 1968, respondent was discharged because of acts of misconduct incompatible with his continued employment (Pet. App., p. 1a). Respondent's discharge was sustained upon administrative review.[3]

[2] The term "nonappropriated fund instrumentality" ~~includes~~ indicates that, with minor exceptions, no revenues are derived from the United States Treasury.

We use the phrases "military exchange" and "exchange service" throughout to refer collectively to the Army and Air Force Exchange Service, the Navy Exchanges, the Marine Corps Exchanges, the Coast Guard Exchanges, and the Exchange Councils of the National Aeronautics and Space Administration. ~~When we refer to the Army and Air Force Exchange Service we use the phrase "exchange service."~~

The exchange service constitutes the nation's third largest department store chain, with annual sales of over $3.5 billion. S. Rep. No. 91–268, 91st Cong., 1st Sess., p. 3 (1969). See generally, Scolnick and Packer, *Evolution of the Army and Air Force Exchange Service,* 8 Air Force JAG Law Review 19 (Sept.–Oct. 1966); *Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 484–485. We have been advised that the total number of civilian employees of the military exchanges exceeds 100,000.

Regulations governing the Army and Air Force Exchange Service (5 C.F.R. 554.1–554.15; AR 60.21/AFR 147.15) are promulgated pursuant to 10 U.S.C. 3012 and 8012, which authorize the Secretary of the Army and the Secretary of the Air Force, respectively, to conduct all affairs of the two Departments.

[3] At the time of respondent's discharge, he was entitled to contest his discharge at a full evidentiary hearing before a grievance committee of three members, with one member of the committee designated by the aggrieved employee; the aggrieved employee was entitled to testify in his own behalf, introduce documentary evidence, call witnesses, and cross-examine adverse witnesses (see AR 60–21/AFR 147–15 (May 14, 1959), Chapter 5, Section IV,

597–252—75——2

Respondent then commenced this suit against the United States in the Court of Claims, contending that his discharge was improper and seeking back pay and allowances.[4] Jurisdiction was asserted under the Tucker Act, 28 U.S.C. 1491.

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paras. 96–99, App. B, *infra*, pp. 27A–21A). The recommendation of the grievance committee was forwarded to the installation commander, who determined the correctness of the dismissal. The employee could appeal from an adverse decision of the installation commander to the "major commander" of the area, who rendered the final decision (*id.*, para. 100, App. B, *infra*, pp. 31A–32A).

These procedures subsequently have been revised. The administrative remedies now available to a discharged employee are contained in Exchange Service Bulletin No. 247 (15–52) (July 2, 1975), App. A, *infra*, *pp.* 8A–17A. An employee is entitled to an advance notice of separation in writing at least 30 days prior to his proposed separation (*id.*, paras. 20–21, App. A, *infra*, pp. 16A–17A). The employee is entitled to present either an oral or a written reply, or both, to the notice of intended separation prior to being separated (*ibid.*). A final decision to separate an employee must be in writing and state, *inter alia*, the basis for the separation, that it is a final decision, and that the employee has 21 days within which to appeal the decision (*id.*, paras. 22, 89, App. A, *infra*, pp. 7A, 11A–12A), in which case a hearing examiner will hear the evidence (*id.*, para. 93, App. A, *infra*, p. 12A), make a written recommendation on the merits of the appeal, and transmit it to the appellate authority (*id.*, para. 95c, App. A, *infra*, p. 14A), which in almost all cases is the Commander of the Army and Air Force Exchange Service, or, in his absence, the Deputy Commander (*id.*, para. 97a, App. A, *infra*, p. 14A). The appellate authority is required to render a written determination on the appeal, noting that the determination is final and not subject to further appeal or review (*id.*, para. 98, App. A, *infra*, pp. 14A–15A).

[4] We are advised that respondent died on June 7, 1974, after the commencement of this suit but prior to the decision of the Court of Claims. The representative of respondent's estate has not yet been substituted as a party, but under Rule 66(a)(1) of the Rules of the Court of Claims a substitution of parties may be made within two years after the death of the plaintiff.

The Court of Claims denied the government's motion to dismiss for lack of jurisdiction. The court acknowledged that prior to 1970 the Tucker Act had not conferred jurisdiction to review discharges of military exchange emloyees (Pet. App., pp. 2a–4a), but the court held that the requisite jurisdiction had been conferred by a 1970 amendment to the Act, Pub. L. 91–350, 84 Stat. 449. That amendment confers jurisdiction over claims founded upon express or implied contracts with a military exchange, and the court held that respondent's relationship with the Army and Air Force Exchange Service was contractual (Pet. App., pp. 5a–9a).

Judge Skelton, noting that the 1970 amendment to the Tucker Act was intended to affect only the rights of third party independent contractors (Pet. App., pp. 11a–14a), dissented on the ground that exchange service personnel are federal employees who hold their positions not by contract but by appointment (Pet. App., pp. 15a–20a).

SUMMARY OF ARGUMENT

The question here turns on whether the United States has waived sovereign immunity to suit by a former employee of the United States Army and Air Force Exchange Service for money damages for an allegedly improper discharge. Waiver cannot be implied but must be unequivocally expressed. *United States* v. *King*, 395 U.S. 1, 4. Such unequivocal expression must be found in a constitutional provision, statute or regulation that creates a substantive

right enforceable against the United States for these money damages or in a contract entered into by the United States. *Eastport S.S. Corp.* v. *United States,* 178 Ct. Cl. 599, 372 F. 2d 1002.

There is no constitutional provision, statute or regulation creating a substantive right, enforceable against the United States, for money damages for improper discharge from a military exchange. Neither the regulations governing employment in the Army and Air Force Exchange Service nor the statutes pursuant to which those regulations were promulgated create a substantive right to compensation from the federal government for wrongful discharge. Indeed, Congress explicitly denied to such employees this right when it excluded them from coverage of certain laws administered by the Civil Service Commission, including the Back Pay Act and the Lloyd-LaFollette Act. 5 U.S.C. (Supp. III) 2105(c).

Furthermore, such a right cannot be founded upon an express or implied contract. Prior to 1970 there was no question about this, for contracts with military exchanges were not contracts "with the United States": Congress had not appropriated funds to support military exchanges nor authorized any official of the exchange to enter into contracts on behalf of the United States. But even with enactment of the 1970 amendment to the Tucker Act, which makes contracts with military exchanges contracts "with the United States," such suits are still barred.

A. The legislative history of the 1970 amendment shows that it was designed solely to provide contractors the same remedies against military exchanges

as they had against other parts of the federal government. It was not designed to affect military exchange employees, whose substantive rights Congress previously had considered. See S. Rep. No. 91–268, 91st Cong., 1st Sess. (1969); H.R. Rep. No. 91–933, 91st Cong., 2d Sess. (1970); Hearings on S. 980 before Subcommittee No. 4 of the House Committee on the Judiciary, 91st Cong., 1st Sess. (1969). The legislative history is silent concerning claims against military exchanges by their employees, although it was clear at the time that such employees were not entitled to sue in the Court of Claims for wrongful discharge.

Military exchanges employ more than 100,000 persons. Had Congress intended to give such a vast number of individuals a forum in which to present their employment grievances it would have so indicated.

Moreover, had it so intended, Congress directly could have provided such a forum by repealing its exclusion of such employees from coverage under the laws administered by the Civil Service Commission and bringing them within the Lloyd-LaFollette Act and the Back Pay Act. Indeed, when it has intended to legislate with respect to the rights of military exchange personnel, it has done so expressly. See, *e.g.,* 5 U.S.C. 8171(b); 42 U.S.C. 410(a)(6)(B)(iv); 5 U.S.C. 8501(1)(E). In contrast, the 1970 amendment to the Tucker Act contains no reference to the right of military exchange employees to sue for back pay.

B. The 1970 amendment by its terms does not confer jurisdiction over the kind of claim respondent asserts here, which is based upon his appointment to

the exchange service rather than upon an express or implied contract.

The regulations governing exchange service employees specify that they are federal employees who hold their positions by appointment and that they are subject to regulations applicable to other federal employees (AR 60–21/AFR 147–15). Moreover, they are deemed "federal employees" for whose tortious actions the United States is liable under the Federal Tort Claims Act, and likewise they have no cause of action under that Act. Federal employees who hold their positions by appointment do not have a contractual relationship with the government. *Taylor and Marshall* v. *Beckham,* 178 U.S. 548, 576; *Crenshaw* v. *United States,* 134 U.S. 99, 104.

Accordingly, the 1970 amendment to the Tucker Act does not confer jurisdiction over suits for money damages brought by discharged exchange service employees.

ARGUMENT

THE COURT OF CLAIMS DOES NOT HAVE JURISDICTION TO ENTERTAIN A SUIT AGAINST THE UNITED STATES FOR MONEY DAMAGES FOR THE IMPROPER DISCHARGE OF AN EMPLOYEE OF A MILITARY EXCHANGE

This case concerns the right of a former civilian employee of the United States Army and Air Force Exchange Service to invoke the jurisdiction of the Court of Claims in a suit against the United States for money damages for an allegedly improper discharge.[5]

[5] Military exchanges themselves are instrumentalities of the United States that are immune from suit absent the express consent of the United States. *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 485.

"[T]he Court of Claims' jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and * * * such a waiver cannot be implied but must be unequivocally expressed." *United States* v. *King,* 395 U.S. 1, 4. See also *Soriano* v. *United States,* 352 U.S. 270, 276; *United States* v. *Shaw,* 309 U.S. 495, 500–501; *Luckenbach S.S. Co.* v. *United States,* 272 U.S. 533, 536. This case turns upon whether the United States has waived sovereign immunity to this type of suit. Apart from the authority expressly conferred by statute, "there is no jurisidiction in the Court of Claims more than in any other court to entertain suits against the United States." *United States* v. *Sherwood,* 312 U.S. 584, 587–588.

Prior to 1970, the pertinent part of the Tucker Act, 28 U.S.C. 1491, that conferred jurisdiction upon the Court of Claims provided:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

That provision did not confer jurisdiction over suits brought by former employees of military exchanges for money damages for wrongful discharge, because such suits were not founded upon "the Constitution, or any Act of Congress, or any regulation, * * * or upon any express or implied contract with the United States * * *."

For the purposes of the Tucker Act, a suit is founded upon "the Constitution, or any Act of Congress, or any regulation" only if the constitutional provision, the statute, or the regulation in question creates a substantive right, enforceable against the United States, for "actual, presently due money damages." *United States* v. *King, supra,* 395 U.S. at 3; *Glidden Co.* v. *Zdanok,* 370 U.S. 530, 557; *United States* v. *Jones,* 131 U.S. 1, 18. The Tucker Act does not itself establish such a substantive right. The Act merely confers jurisdiction upon the Court of Claims in cases in which such a substantive right exists independently. As the Court of Claims observed in *Eastport S. S. Corp.* v. *United States,* 372 F. 2d 1002, 1009:

> [W]hat one must always ask is whether the constitutional clause or the legislation which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained. If not, [the Court of Claims] cannot give relief under [the Tucker Act], although some separate general principle—arising, for example, from tort law—might lead to a remedy in another forum or under some special relief provision.

Thus, it is not sufficient under the Tucker Act that a plaintiff claim that he was deprived of a right granted by a constitutional provision, a statute, or a regulation; the provision upon which the claim is founded must create a substantive right to monetary compensation from the federal government. See our brief in *United States* v. *Testan and Zarrilli,* No. 74–753, argued November 12, 1975. Moreover, an executive order or regulation may create a right to monetary compensation only if promulgated pursuant to a statute that authorizes or requires the creation of such a right, for only Congress has the power to waive the immunity of the United States from suit. See, *e.g., United States* v. *U.S. Fidelity & Guaranty Co.,* 309 U.S. 506, 513; *United States* v. *Shaw,* 309 U.S. 495, 500–502; *Munro* v. *United States,* 303 U.S. 36, 41; *Finn* v. *United States,* 123 U.S. 227, 232.

Since the regulation governing employment with the Army and Air Force Exchange Service (AR 60–21/AFR 147–15) neither itself creates a substantive right to compensation from the federal government for wrongful discharge nor was promulgated pursuant to an Act of Congress creating such a right, suits brought by former employees of the exchange service for money damages for wrongful discharge are not founded upon "the Constitution, or any Act of Congress, or any regulation" within the meaning of the Tucker Act. The Court of Claims here acknowledged this when it observed that prior to 1970 the Tucker Act had not conferred jurisdiction to review discharges of military exchange employees (Pet. App., pp. 2a–4a).

Indeed, Congress has explicitly denied to such employees a substantive right to monetary compensation for wrongful discharge. To be sure, Congress has vested military exchange employees with some substantive rights against the United States. For example, such employees are granted the protection of the

597-252—75——3

Longshoremen's and Harbor Workers' Compensation Act, 5 U.S.C. 8171(b), the Social Security Act, 42 U.S.C. 410(a)(6)(B)(iv), the unemployment compensation statue, 5 U.S.C. 8501(1)(E), and various minimum wage and overtime benefit laws, 29 U.S.C. 201, *et seq.* However, Congress expressly excluded military exchange employees from the coverage of certain laws administered by the Civil Service Commission,[6] such as the Back Pay Act[7] and the Lloyd-LaFollette Act,[8] which establish other substantive rights, including the right to money damages for wrongful discharge.

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[6] 5 U.S.C. (Supp. III) 2105(c) provides in pertinent part that:

"An employee paid from nonappropriated funds of the Army and Air Force Exchange Service * * * is deemed not an employee [of the United States] for the purpose of—

"(1) laws (other than subchapter IV of chapter 53 [dealing with the prevailing rate system] and sections 5550 [also dealing with that system] and 7154 [prohibiting, in certain contexts, discrimination based on race, color, creed, sex, or marital status] of this title) administered by the Civil Service Commission; or

"(2) subchapter I of chapter 81 [dealing with compensation for work-related injuries] and section 7902 of this title [federal safety programs].

"This subsection does not affect the status of these nonappropriated fund activities as Federal instrumentalities."

[7] The Back Pay Act authorizes the retroactive recovery of wages whenever the employee has been subjected to "an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part" of the compensation to which he was otherwise entitled. 5 U.S.C. 5596.

[8] The Lloyd-LaFollette Act provides than an individual in the competitive service may be removed or suspended without pay only "for such cause as will promote the efficiency of the service," and that such an individual is entitled to a statement of reasons for the suspension, notice of the charges against him, a copy of the charges, an opportunity to file a written answer, and a written decision on the answer. 5 U.S.C. 7501.

Furthermore, prior to 1970, it also was clear that suits by former military exchange employees were not founded "upon any express or implied contract with the United States," for contracts with military exchanges were not contracts "with the United States" within the meaning of the Tucker Act: Congress had not appropriated funds to support the military exchanges or authorized any official of the exchanges to enter into contracts on behalf of the United States. Accordingly, prior to 1970, the Court of Claims lacked jurisdiction to entertain any suits against the United States for breach of contract with military exchanges and therefore *a fortiori* lacked jurisdiction over suits brought by former exchange service employees for wrongful discharge. See, *e.g.*, *Swiff-Train Co.* v. *United States,* 443 F.2d 1140 (C.A. 5) (contract to supply carpeting); *Jaeger* v. *United States,* 394 F.2d 944 (C.A.D.C.) (suit for contractual bailment); *Pulaski Cab Company* v. *United States,* 141 Ct. Cl. 160, 157 F. Supp. 955 (contract for taxicab services); *Kyer* v. *United States,* 177 Ct. Cl. 747, 369 F.2d 714 (contract for brokerage services); *Borden* v. *United States,* 126 Ct. Cl. 902, 116 F. Supp. 873 (contract for account services); *Edelstein* v. *South Post Officers Club,* 118 F. Supp. 40 (E.D. Va.) (contract for supplies). Cf. *Nimro* v. *Davis,* 204 F.2d 734 (C.A.D.C.).

The Tucker Act was amended in 1970 by Pub. L. 91–350, which provided for the first time:

> * * * [A]n express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges,

> Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

Thus, the pivotal issue in the present case is whether an employee of a military exchange has an express or implied employment contract with the exchange that creates a substantive right to money damages for unlawful discharge. In the following sections we show that when it enacted the 1970 amendment to the Tucker Act, Congress did not recognize the existence of or intend to create such a right, and that employment relationships with military exchanges are not contractual.

A. CONGRESS DID NOT INTEND TO AFFECT THE SUBSTANTIVE RIGHTS OF EMPLOYEES OF MILITARY EXCHANGES WHEN IT AMENDED THE TUCKER ACT.

The 1970 amendment to the Tucker Act was designed to provide contractors the same remedies against military exchanges as they had against other parts of the federal government. It was not intended to affect the substantive rights of exchange service employees who, like other federal employees, do not have a contractual relationship with the government.

As we indicated above (pp. 12–13, *supra*), Congress had considered the status of military exchange employees on several occasions prior to 1970 and had declined to provide such employees with any right to back pay for wrongful discharge. The congressional concern manifested by the amendment to the Tucker Act in 1970 was directed at the entirely separate question of the rights of independent contractors to recover money damages from the United States for a military exchange's breach of construction, supplies, or service contracts. See, *e.g.*, 115 Cong. Rec. 3162 (1969); S. Rep. No. 91–268, 91st Cong., 1st Sess., p. 2 (1969) (hereinafter Senate Report); H.R. Rep. No. 91–933, 91st Cong., 2d Sess., p. 2 (1970) (hereinafter House Report); Hearings on S. 980 before Subcommittee No. 4 of the House Committee on the Judiciary, 91st Cong., 1st Sess. (1969) (hereinafter Hearings).

Thus, in his introductory statement opening the hearings on S. 980, 91st Cong., 1st Sess. (1969) the bill which was to become the 1970 amendment, Senator Tydings, its sponsor, explained its purpose (Hearings at 4; emphasis supplied):

> In sum, I believe that S. 980 is consistent with the public policy of the United States clearly expressed in the Tucker Act, that the sovereign immunity of the United States to contract suit should be waived when complaints are filed in an appropriate forum. *S. 980 will provide contractors with nonappropriated fund activities of or under the United States or departments or agencies of the United States with the same contract remedies available to those who contract directly with those departments or agencies in furtherance of activities supported by appropriated funds.* In so doing, S. 980 will erase an anachronistic and baseless distinction between suits on contracts of the United States to be paid out of appropriated funds and those to be paid out of nonappropriated funds.

Witnesses at the Hearings repeatedly emphasized the limited scope of the proposed legislation. For ex-

ample, Lt. Col. Benjamin H. Rosker, testifying on behalf of the Department of Defense, stated (Hearings at 14):

> To this day, although a nonappropriated fund activity may bring suit against its contractors, neither the fund nor the United States may be sued. For the individual businessman who enters the marketplace, this would be an enviable advantage.

None of the witnesses at the Hearings even mentioned exchange service employees, let alone suggested that the proposed legislation would affect them in any way.

The Senate Report on S. 980 similarly reflected a congressional understanding that the proposed legislation related only to the claims of contractors with military exchanges and that its effect would be to put such contractors on an equal footing with those who contracted with federal agencies supported by appropriated funds (Senate Report at 4–5):

> S. 980 will provide contractors with nonappropriated fund activities of or under the United States or departments or agencies of the United States with the same contract remedies available to those who contract directly with those departments or agencies in furtherance of activities supported by appropriated funds.

The legislative history of the 1970 amendment is silent concerning claims against military exchanges by their employees. Although it was clear at the time that such employees were not entitled to sue for wrongful discharge in the Court of Claims, there is no direct reference in any of the reports, hearings, or

debates to that fact and no indication that Congress intended to provide a forum for such suits.[9]

As the Fifth Circuit pointed out in *Young* v. *United States*, 498 F. 2d 1211, 1215, there is no language in the legislative history that would support "an inference that Congress intended these amendments as a vehicle for redressing grievances of employees of these instrumentalities as well as settling claims of third parties with whom the instrumentalities contract for goods and services."[10] Accordingly,

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[9] One case cited in the legislative history, *Keetz* v. *United States*, 168 Ct. Cl. 205, did involve a claim arising out of the discharge of a military exchange employee. It was this citation upon which the majority of the Court of Claims relied here (Pet. App., p. 9a). However, all other cases cited in the legislative history dealt with independent contractors, not employees. Thus, as the Fifth Circuit stated in *Young* v. *United States*, 498 F. 2d 1211, 1217, n. 5:

"* * * [I]n light of the fact that these cases were cited as instances where sovereign immunity had been held to bar suits, and were not discussed on their facts either in the debates or the reports and other documents accompanying the proposed amendments, we think the mere fact that *Keetz* was cited is not enough to defeat our conclusion [that the 1970 amendment did not confer Tucker Act jurisdiction over suits by discharged exchange service employees]."

[10] The Fifth Circuit in *Young* was construing the 1970 amendment to 28 U.S.C. 1346(a)(2), but that amending language was identical to the language in 28 U.S.C. 1491 at issue here. Moreover, the purpose of the two amendments was necessarily the same, since they served to confer identical concurrent jurisdiction on the district courts and the Court of Claims. See *Richardson* v. *Morris*, 409 U.S. 464, 465–466; *United States* v. *Sherwood*, 312 U.S. 584, 591.

The Fifth Circuit nevertheless concluded in *Young*, in our view incorrectly, that it had jurisdiction under the Administrative Procedure Act. There is a conflict among the courts of appeals on that issue. See, *e.g.*, *Bramblett* v. *Desobry*, 490 F. 2d 405, 407 (C.A. 6), certiorari denied, 419 U.S. 872.

Judge Skelton correctly observed in his dissent here (Pet. App., p. 13a) that the amendment represents "[t]he intention of Congress to close a loophole with respect to contractual claims of third party independent contractors * * *" and has nothing whatever to do with the separate question of the rights of discharged employees."

The military exchanges employ more than 100,000 persons (see note 2, *supra*). Had Congress intended to give that large group a forum in which to seek damages for employment grievances, it surely would have so indicated in the Senate or House Report or during the hearings or debates.[12] Moreover, it presum-

[11] Judge Skelton further noted (Pet. App., p. 14a):

"The legislative history speaks clearly and unambiguously. Public Law 91–350 was intended by Congress to waive sovereign immunity solely over claims of third party independent contractors arising as a result of contracts with nonappropriated fund instrumentalities such as the AAFES. The legislative history is silent concerning claims against the AAFES by employees. No reference is made to the lack of a Court of Claims forum for the resolution of pay claims or other employment grievances for AAFES employees. It seems clear to me that Congress did not intend to provide additional remedies for nonappropriated fund instrumentality employees when it passed Pub. L. 9–350 [*sic*]; its only aim was to correct an anomalous situation with respect to those third party independent contractors having explicit contracts with the Exchange Services."

[12] Indeed, Congress limited the amendment to a narrow category of claims that could be remedied without cost to federal taxpayers. The scope of the bill was narrowed considerably before passage, from coverage of any "nonappropriated fund activity of or under the United States or a department or agency of the United States," in an early version, to coverage of only the specifically enumerated instrumentalities listed in the final version (see Senate Report at 3–4). The Senate Report stated (at p. 5) that waiver should

ably would have done so explicitly and directly by bringing those employees within the ambit of the Lloyd-LaFollette Act and the Back Pay Act. But Congress did not do so, and it should not be presumed to have achieved by indirection what it did not do directly.

When Congress has intended to legislate with respect to the rights of military exchange personnel, it has done so specifically and expressly. Congress expressly excluded such employees from laws administered by the Civil Service Commission, including provisions for money damages for wrongful discharge (see pp. 12–13, *supra*). It expressly included such employees within other remedial legislation relating to employees (*ibid.*). In contrast, the 1970 amendment to the Tucker Act contains no reference to the right of military exchange employees to sue for back pay. As the Fifth Circuit correctly observed in *Young* v. *United States, supra,* 498 F. 2d at 1217 (footnote omitted):

> * * * In construing the 1970 amendments to the Tucker Act, we cannot ignore the fact that, in the much larger statutory scheme embracing federal employment, Congress has, when it has thought such action appropriate, dealt with Exchange Service employees directly and specifically. In our view, this circumstance, coupled with the dearth of concern with employment relationships in the legislative history of the 1970 amendments, strengthens our conclusion

affect "only institutions capable of reimbursing the United States for money judgments incurred on their account and 'subject to control by the responsible officials of the Government.'"

that those amendments were not intended to extend Tucker Act jurisdiction to the sort of "contract" plaintiff asserts existed in this case.

Congressional silence about exchange service employees in the legislative history and in the language of the 1970 amendment to the Tucker Act can only mean that Congress did not recognize any substantive right in such employees to money damages for wrongful discharge and did not intend to waive sovereign immunity with respect to such claims. Furthermore, as we now show, that amendment by its terms does not confer jurisdiction over the kind of claim respondent asserts here.

B. EMPLOYEES OF MILITARY EXCHANGES ARE FEDERAL EMPLOYEES WHO HOLD THEIR POSITIONS NOT BY EXPRESS OR IMPLIED CONTRACT BUT BY APPOINTMENT

The regulations presently governing employment in the Army and Air Force Exchange Service[13] specify that "[exchange service] personnel are Federal employees of an instrumentality of the United States within the Department of Defense" (AR 60–21/AFR

[13] The regulations now in effect as set forth in Appendix A to this brief, *infra*, pp. 1A–17A, are substantially similar to the regulations in effect during respondent's employment with the Army and Air Force Exchange Service, from April 1958 to August 1968. The regulations periodically were reissued with slight modifications during the nine-year interval. Indeed, the very fact that the terms of respondent's employment underwent such regular and unilateral modification belies his contention that he had an express or implied contract with the exchange service. Pertinent provisions of the regulations in effect near the start of respondent's employment (AR 60–21/AFR 147–15, (May 14, 1959)) are set out at Appendix B, *infra*, pp. 18A–32A.

147–15 (November 12, 1974), Chapter 1, Section I, para. 1–7, App. A, *infra*, p. 3A) and that such personnel, with limited exceptions,[14] hold their positions by appointment (*id.*, Section II, para. 1–9*f*, Chapter 2, Section I, para. 2–2*a*, 2–3, App. A, *infra*, pp. 3A–4A, 5A–6A). In other words, exchange service employees are federal employees, albeit in a special category, and like other federal employees they hold their positions by appointment and not by contract.[15]

Like other federal employees, those in the Army and Air Force Exchange Service are barred from taking part in partisan political activities (AR 60–21/AFR 147–15 (November 12, 1974), Chapter 1, Section III, para. 1–13*b*(2), App. A, *infra*, p. 4A), from advocating the violent overthrow of the United States or from belonging to any organization which so advocates (*id.*, para. 1–17*a* and *b*, App. A, *infra*, p. 4A), and from participating in a strike against the United States (*id.*, para. 1–17*c*, App. A, *infra*, p. 4A). They are subject to statutes, regulations, and Executive Orders relating to the safeguarding of classified government information (*id.*, para. 1–21*c*, App. A, *infra*, p. 5A), and, prior to employment, they must receive

[14] Only in isolated cases will a military exchange enter into a contract of employment. See, *e.g.*, *Borden* v. *United States*, 126 Ct. Cl. 902, 116 F. Supp. 873.

[15] The Court of Claims premised its contrary holding upon a determination that an employee of a military exchange has a contractual relationship with his employer. The court relied upon its decision in *Keetz* v. *United States*, 168 Ct. Cl. 205. But in *Keetz* the court simply asserted, without analysis, that a contractual relationship existed; hence, *Keetz* is not persuasive authority for that proposition.

security clearance (*id.*, para. 1–22*a*, App. A, *infra*, p. 5A). They are paid according to wage schedule similar to the Classification Act General Schedule, which governs Civil Service personnel (*id.*, Chapter 2, Section II, para. 2–12*b*, App. A, *infra*, p. 6A; Chapter 4, Section II, para. 4–19, App. A, *infra*, pp. 7A–8A).

Like other federal employees, their employment may be terminated only for cause, such as gross inefficiency (*id.*, Chapter 3, Section I, para. 3–7), insubordination, or violation of law (*id.*, para. 3–4*a*(2), (3), App. A, *infra*, p. 6A).

Regulations governing the dismissal of exchange service employees provide all administrative procedures required for dismissal of Civil Service employees (*id.*, Chapter 3, Section I, as amended by Exchange Service Bulletin No. 247 (15–52), July 2, 1975).

Finally, exchange service employees are deemed "federal employees" for whose tortious actions the United States is liable under the Federal Tort Claims Act, 28 U.S.C. 1346(b). See, *e.g.*, *Rizzuto* v. *United States*, 298 F. 2d 748, 749–750 (C.A. 10); *United States* v. *Holcombe*, 277 F. 2d 143 (C.A. 4); *United States* v. *Forfari*, 268 F. 2d 29, 31 (C.A. 9); *Grant* v. *United States*, 162 F. Supp. 689 (S.D.N.Y.). Likewise, because they are considered to be federal employees, they have no cause of action under that Act. See, *e.g.*, *Daniels* v. *Chanute AFB Exchange and United States*, 127 F. Supp. 920 (E.D. Ill.).

Federal employees who hold their positions by appointment do not have a contractual relationship with the government. See, *e.g.*, *Taylor and Marshall* v.

Beckham, 178 U.S. 548, 576–577; *Crenshaw* v. *United States*, 134 U.S. 99, 104–108; *Urbina* v. *United States*, 428 F. 2d 1280, 1283–1284 (Ct. Cl.). Their employment rights derive from statute or regulations, not from any contract, express or implied. See, *e.g.*, *Sampson* v. *Murray*, 415 U.S. 61, 70.

The regulations governing employment in the Army and Air Force Exchange Service confirm this distinction. Authority to *appoint* personnel is vested in the Commander of the Army and Air Force Exchange Service and a Board of Directors (AR 60–21/AFR 147–15 (November 12, 1974), Chapter 1, Section II, para. 1–9, App. A, *infra*, pp. 3A–4A). The Commander is also authorized "[i]n unusual circumstances" to conclude "a special employment agreement with an individual employed to accomplish a specific function in a specified period of time" (*id.*, Chapter 4, Section II, para. 4–19*b*(4), App. A, *infra*, p. 8A). Appointees' wages are fixed in accordance with specified schedules (*id.*, Chapter 2, Section II, para. 2–12*b*(1), App. A, *infra*, p. 6A); only "when the employee is hired pursuant to an employment contract" is payment made "[i]n accordance with the terms of the contract" (*id.*, para. 2–12*b*(2), App. A, *infra*, p. 6A).

Respondent was not "hired pursuant to an employment contract."[16] To the contrary, like the great ma-

[16] For a contract to exist, there must be a meeting of the minds and mutual consent to be bound. See, *e.g.*, *J. C. Pitman & Sons, Inc.* v. *United States*, 161 Ct. Cl. 701, 705, 317 F. 2d 366, 368; *Porter* v. *United States*, 204 Ct. Cl. 355, 365–366, 496 F. 2d 583, 590; *Algonac Manufacturing Co.* v. *United States*, 192 Ct. Cl. 649, 428 F. 2d 1241. The Army and Air Force Exchange Service has evinced no intention to contract with respondent.

jority of exchange service employees, respondent was appointed to his position in the Army and Air Force Exchange Service. His claim, therefore, was not based upon an express or implied contract. Accordingly, the Court of Claims lacked jurisdiction to consider it.

This is the only conclusion that accords with the history of judicial review of federal employee claims. Prior to enactment of the Lloyd-LaFollette Act and the Back Pay Act, federal personnel actions were not subject to judicial review. Courts repeatedly refused to intervene where an employee claimed that he had been wrongfully discharged. See, *e.g.*, *Sampson* v. *Murray, supra*, 415 U.S. at 69–70; *Keim* v. *United States*, 177 U.S. 290, 293–296.

Since Congress has not extended the protections of the Lloyd-LaFollette Act and the Back Pay Act to exchange service employees, of necessity such employees stand in the same posture as did other federal employees before enactment of those Acts. By assuming jurisdiction here, the Court of Claims has in effect exercised a legislative power to extend those Acts to exchange service employees—a legislative power that Congress has refused to exercise.[17]

[17] Apparently underlying the Court of Claims' decision was its concern that the unavailability of a Tucker Act remedy in these circumstances would work a "harsh result" (Pet. App., p. 9a). That, of course, was, within constitutional limits, a matter for Congress to decide. But the Court of Claims in any event erred in believing that exchange service employees would thereby be left without redress for wrongful discharge. As noted above (n. 3, *supra*), a discharged employee of the Army and Air Force Exchange Service is entitled to administrative review of the propriety of his discharge. The district courts have jurisdiction to review the administrative proceedings to ensure that they complied with the review procedures established by regulation. See *Service* v. *Dulles*, 354 U.S. 363; *Vitarelli* v. *Seaton*, 359 U.S. 535; *Taylor* v. *United States Civil Service Commission*, 374 F. 2d 466 (C.A. 9); *McTiernan* v. *Gronouski*, 337 F. 2d 31 (C.A. 2).

CONCLUSION

The judgment of the Court of Claims should be reversed.

Respectfully submitted.

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APPENDIX A

5 U.S.C. (Supp. III) 2105(c) provides:

An employee paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of—

(1) laws (other than subchapter IV of chapter 53 and sections 5550 and 7154 of this title administered by the Civil Service Commission; or

(2) subchapter I of chapter 81 and section 7902 of this title. This subsection does not affect the status of these nonappropriated fund activities as Federal instrumentalities.

32 C.F.R. 554.2(a) provides:

Exchange service. Exchange service is the provision to authorized patrons of merchandise and services of necessity and convenience not furnished from Federal appropriations.

32 C.F.R. 554.4 provides:

It is the purpose of the Secretary of the Army and the Secretary of the Air Force to provide a centrally governed and jointly operated worldwide exchange service to accomplish the following objectives:

(a) Adequate and substantially uniform exchange services to meet the needs of the Army and the Air Force.

(b) Lowest possible prices substantially uniform worldwide.

(c) Reasonable profits as are determined necessary to supplement appropriated funds for the support of Army and Air Force welfare and recreational programs.

(d) Joint Service participation in the use of funds, inventory, personnel, and facilities, and in the organization of operating elements on a geographical basis.

(e) Maximum management efficiency through the application of modern business methods, uniform operational and fiscal controls, and optimum use of combined resources.

597-252—75——8

(f) A soundly financed, flexible exchange service organization responsive to command and logistic requirements, in both peace and war.

(g) Maximum coordination in the provision of procurement, warehousing, inventory control, and distribution services to avoid uneconomical duplication of these activities.

32 C.F.R. 554.5 provides:

The Army and Air Force Exchange Service (A&AFES) is the entity embracing the activities, personnel, property, and nonappropriated funds through which exchange service is provided within the Army and the Air Force.

(a) The Board of Directors, Army and Air Force Exchange and Motion Picture Services (Board of Directors) is responsible to the Secretary of the Army and the Secretary of the Air Force through the respective Chiefs of Staff for directing the A&AFES.

(b) The Chief, A&AFES, acting for the Board of Directors, develops uniform operating policies, plans, programs, and procedures and, with his staff and field offices, administers the A&AFES.

(c) Army and Air Force major commanders are responsible for the establishment, operation, and command supervision of exchanges within their respective commands in accordance with Departmental directives.

(d) The establishment of an exchange is authorized at installations where military personnel are present and assigned for duty. An exchange may be established at a location other than an installation upon approval of the Department concerned if military personnel are present and assigned to duty at that location.

(e) Within the Continental United States, an exchange is established to serve one or more installations or a geographical area, which may involve one or more commanders. The exchange activities of two or more separate installations, Army or Air Force, may, by agreement between the commanders concerned, be combined in a parent-satellite relationship and operated as a single exchange.

(f) In oversea areas, an exchange system is established to serve a command or geographical area. Unless otherwise authorized by a Board of Directors, Army and Air Force personnel within a designated geographical area will be served by a single exchange system operated as a joint activity and governed by an area council responsible to the respective Army and Air Force component

commanders. The area council will be composed of equal Army and Air Force representation and the council chairmanship will alternate between the two Services.

32 C.F.R. 554.6 provides:

The A&AFES is an instrumentality of the United States. As such, it is entitled to the immunities and privileges enjoyed by the Federal Government under the Constitution, Federal statutes, established principles of International Law, and international treaties and agreements. The A&AFES is immune from direct State taxation and from State regulatory laws, such as licensing and price control statutes, whose application would result in interference with the performance by the A&AFES of its assigned Federal functions. Suits by or against the A&AFES or individual exchanges are in legal effect suits by or against the United States and must be brought in the name of the United States. However, claims against the A&AFES or individual exchanges and judgments, including compromise settlements of court actions, against the United States arising out of exchange activities are payable solely out of A&AFES funds.

32 C.F.R. 554.11 provides:

(a) *Military.* Army and Air Force officers will be in executive control of the A&AFES. Enlisted personnel will only be assigned to exchange duty as prescribed in applicable directives. Enlisted personnel employed during off-duty hours to supplement available civilian manning will be compensated from A&AFES funds.

(b) *Civilian.* Civilian personnel paid from A&AFES funds will be utilized to satisfy normal administrative and operational manning requirements within the exchange service. Policies and procedures governing the administration of A&AFES civilian employees will be in accordance with the Act of 19 June 1952 (5 U.S.C. 105k, k–1) and applicable departmental directives.

ARMY REGULATION NO. 60–21/AIR FORCE REGULATION NO. 147–15 (NOVEMBER 12, 1974) provides in pertinent part:

* * * * *

1–7. Status of employees. *a.* AAFES personnel are Federal employees of an instrumentality of the United States within the Department of Defense.

* * * * *

1–9. Personnel authority. *a.* The authority to establish personnel policy is vested in the Board of Directors, Army and Air Force

Exchange and Motion Picture Service, hereinafter referred to as the Board of Directors.

* * * * *

f. The authority to appoint and promote AAFES employees with or to grades designated above USP 15 is vested in the Board of Directors.

g. Authority must be exercised in accordance with this regulation and procedures published by the Commander, AAFES.

* * * * *

1–13. Political activity of Federal employees. *a.* No inquiry will be made concerning the political affiliations of an employee or applicant for employment with the AAFES and any such disclosure will be ignored. The foregoing is not intended to preclude inquiry as to organizational memberships which are by law or regulation a disqualification for employment or retention with the Federal Government.

b. No person within AAFES will—

(1) Use his official authority or influence for the purpose of interfering with an election or of affecting its results.

(2) Take any active part in partisan political management or partisan political campaigns.

c. All persons, however, will retain the right to vote as they choose and to express their opinions on all political subjects and candidates, and to participate in nonpartisan political activity.

* * * * *

1–17. Loyalty and striking. No person shall accept or hold office or employment in the Government of the United States or any agency thereof, including wholly owned government corporations who—

a. Advocates the overthrow of our constitutional form of government in the United States;

b. Is a member of an organization that advocates the overthrow of our constitutional form of government in the United States, knowing that such organization so advocates;

c. Participates in any strike or asserts the right to strike against the Government of the United States or such agency; or

d. Is a member of an organization of government employees that asserts the right to strike against the Government of the United States or such agencies, knowing that such organization asserts such right.

* * * * *

1–21. Safeguarding information. *a.* AAFES employees will not disclose or discuss official records and business of AAFES at any time, except as necessary to discharge official duties.

b. It is intended to prohibit the prior distribution of official information not available to the general public to individuals who would gain an advantage not accorded others. It is not intended that unclassified information which may be released should be withheld from the press or the public.

c. Each employee is subject to penal laws, regulations, and Executive Orders relating to safeguarding classified information.

1–22. Security clearance for civilian personnel. *a.* Army or Air Force regulations concerning nonappropriated fund civilian personnel security investigations and adjudications apply to AAFES employees at installations of the Army and Air Force, respectively.

* * * * *

2–2. Appointment criteria. *a.* To be considered for appointment, an individual must submit a complete and accurate application for employment reflecting that the individual meets the minimum requirements for the position under consideration.

* * * * *

2–3. Appointment. *a.* After selection of an individual for appointment, but prior to official appointment, each individual must submit the following:

(1) Evidence that he is in satisfactory physical condition, if requested. The appointing authority may, if he deems it advisable, require a medical certification or physical examination at AAFES expense.

* * * * *

c. Official appointment will be effective upon issuance to the individual of a copy of a properly executed AAFES personnel action. The effective date of appointment will be the date indicated on the personnel action.

d. Appointments are considered probationary for the periods specified below and these periods may not be extended.

(1) Positions paid under the Universal Salary Plan, management trainee program and college trainee program—1 year.

(2) All other positions—90 days.

e. Employees will not be appointed to part-time, temporary or on-call employment for the purpose of determining the employee's suitability for regular full-time employment.

f. Employees will be appointed to step 1 of the grade assigned to the position the employee will occupy, except that:

(1) Employees with special qualifications or experience may be appointed to step 2.

(2) Employees who will require further training may be assigned to a lower grade, in accordance with the provisions on training assignment in section I, chapter 4.

(3) Upon specific approval by the Commander, AAFES, an employee can be appointed to a step higher than step. 2.

* * * * *

2–12. Employee utilization, payment, and benefits. *a.* Regular full-time, regular part-time, temporary full-time, temporary part-time, and on-call employees will be utilized to perform approved standard and nonstandard jobs. Casual employees may be utilized to fill unskilled non-recurring jobs.

b. Payment may be made—

(1) In accordance with the Universal Salary Plan, Hourly Pay Plan, or Commission Pay Plan for all employees, except casual employees. To regular part-time employees, in accordance with the Universal Salary Plan, if approved by the Commander, AAFES.

(2) In accordance with the terms of the contract when the employee is hired pursuant to an employment contract.

* * * * *

3–4. Verbal reprimand. *a.* A verbal reprimand may be given by the employee's supervisor based upon any of the following:

(1) Failure to adequately perform his job as set out in the employee's job description.

(2) Conduct on the job involving insubordination, violation of laws, regulations, rules or procedures, or other conduct incompatible with maximum employee efficiency.

(3) Conduct off the job reflecting discredit on AAFES.

* * * * *

3–8. Separation for cause. An employee may be separated for cause (sec. II, this chap.) by the official with authority to separate the employee (sec II, chap. 1) on the basis of conduct specified in paragraph 3–4*a*(2) or (3) when—

a. Other disciplinary actions and/or counseling are determined to be inappropriate, or

b. Other disciplinary actions and/or counseling have been utilized without apparent success, and

c. The act of misconduct or delinquency is of such a nature or so repetitious that retention of the employee in any capacity is determined to be incompatible with the best interest, AAFES.

* * * * *

4–19. Rates of pay and pay plans. Rates of pay will be determined on the basis of the duties and responsibilities of the job (except as provided in para 4–11 and sec II, chap. 5) and generally will be commensurate with the prevailing rates for comparable work on a local, sectional, or nationwide basis. In oversea areas, rates of pay for US citizens will be fixed in conformity with rates paid for work of a comparable level of difficulty and responsibility to employees assigned in the United States, to the extent consisent with oversea major command policy. United States citizen employees in oversea areas whose rates of pay are so fixed will be paid allowances and differentials pursuant to Executive Order 11137 of 7 January 1964.

a. The following pay plans are authorized:

(1) Universal Salary Plan (USP)

(2) Hourly Pay Plan (HPP).

(3) Commission Pay Plan.

(4) Special employment agreement.

b. Rates of pay, structure, and availability of the authorized pay plans will be established as described below.

(1) The rates and grade and step structure of the Universal Salary Plan will be commensurate with the rates and grade and step structure of the Civil Service General Schedule. A special "A" grade conversion schedule will be published by the Commander, AAFES for compensation of those employees retaining eligibility for payment at "A" rates earned under previous classification policies. When General Schedule rates are changed, the Commander, AAFES, will adjust the USP rates to insure that they continue to be commensurate. The USP is applicable to executive, managerial, professional, and technical jobs and the employees occupying those jobs in accordance with job classification procedures established by the Commander, AAFES. In foreign areas, the USP is applicable only to US citizens and US nationals. The rates and structure for Special Rate will be as prescribed by the Board of Directors as a level higher than grade USP 15. Special Rate is applicable to positions and individual employees, as approved by the Board of Directors.

(2) The rates of pay for the HPP will be established by the Department of Defense Nonappropriated Fund Salary and Wage

Fixing Authority (DOD, NAF, S&WFA). In the 50 states, the District of Columbia, Guam, and Puerto Rico, the approved rates are based upon the average of rates paid by reputable employers in the community for similar work under similar conditions, as determined on the basis of locality wage surveys. In other areas, local conditions, oversea major command policies, and applicable treaties and agreements will be considered in determining the approved rates. The HPP consists of a series of wage schedules containing five steps in each grade, the number of which is approved by the Commander, AAFES. The HPP is applicable to administrative support, patron services, craft and trades, craft and trades (leader), and craft and trades (supervisor) jobs, and to the employees occupying these jobs in accordance with position classification procedures established by the Commander, AAFES, pursuant to DOD, NAF, S&WFA job grading standards.

(3) Rates paid under the Commission Pay Plan will be computed on the basis of an established percentage of sales volume attributable to the employee. The commission percentage will be established by the Commander, AAFES, on the basis of locality wage surveys in the 50 United States, the District of Columbia, Guam and Puerto Rico, or upon approprite data from other sources. The Commission Pay Plan is applicable to jobs for which it is deemed appropriate by the Commander, AAFES.

(4) In unusual circumstances, as determined by the Commander, AAFES, rates of pay other than those established under the pay plans described in (1), (2), and (3) above may be established by the Commander, AAFES, for the purpose of concluding a special employment agreement with an individual employed to accomplish a specific function in a specified period of time. This authority may not be delegated. Rates of pay for such special employment will not exceed the maximum rate of grade USP 15.

* * * * *

EXCHANGE SERVICE BULLETIN NO. 247 (15-52) (JULY 2, 1975), provides in pertinent part:

* * * * *

ADVERSE ACTIONS AND ADMINISTRATIVE APPEALS

81. The provisions of this directive pertaining to adverse actions and administrative appeals apply to regular full-time and regular part-time employees.

82. The advance notice of an adverse action will be in writing and will:

a. Identify the specific adverse action contemplated.

b. State the effective date of the action contemplated, which will be no earlier than 30 calendar days following the employee's receipt of the advance notice.

c. State specifically and in detail the reasons for the adverse action contemplated, with sufficient information (such as dates, places, events, names, etc.) to ensure that the employee understands the reasons for the proposed action and to afford him a fair opportunity to respond.

d. Advise the employee of his right to reply, orally, and/or in writing, and to submit affidavits in support of his reply. The employee will be afforded an opportunity to be accompanied by a representative during his oral reply if he so requests. Any expenses involved in making an oral reply will be borne by the employee. He will be permitted to make any presentations he feels are relevant and should be considered before the final decision. The right of reply does not include the right to a hearing with testimony from witnesses for both sides of the controversy, but is an opportunity for refutation of the advance notice. When a reply is made orally, a written record will be made and, if possible, the signature of the employee will be added as an indication that he agrees with its accuracy.

e. Identify the official to receive the written or oral reply.

f. Advise the employee that the reply must be filed within five workdays of receipt of the advance notice of the proposed action but that, upon good cause shown, the official with authority to separate may extend the period to reply up to an additional five workdays or a total period not to exceed 10 workdays from the employee's receipt of the advance notice of the proposed action, provided the request for extension is received within five workdays of the employee's receipt of the advance notice.

g. Advise the employee that his reply to the advance notice of adverse action will be given full consideration before a final decision is made.

h. Inform the employee that a written final decision will be made within 10 workdays of receipt of his reply or, if no reply is made within the authorized reply period, a written final decision will be made following expiration of the authorized reply period.

83. Within 10 workdays of receipt of the employee's reply and after giving full consideration of the employee's reply or, if no reply is received, on the day following expiration of the authorized reply period, the official taking the action will make a final deci-

sion. If the decision is to withdraw the action, the employee will be notified in writing. If the decision is adverse to the employee, whether it is to take the same action originally contemplated or a less severe action. the employee will be advised of the action to be taken. (If the official taking the action has made a decision to impose a less severe action, a new advance notice is not necessary.) The final decision will be in writing and will:

a. Reference the advance notice of adverse action.

b. Advise the employee, if a reply was received, that full consideration was given to his oral and/or written reply; or if no reply was received, state that no reply was received.

c. State the action to be taken and the paragraph of this directive under which it is being taken.

d. State the basis for the action and which of the reasons in the advance notice of proposed action were resolved in favor of the employee and which against the employee. (The final decision will not add to the reasons stated in the advance notice.)

e. State the effective date of the action (which must be at least 30 calendar days from the date the employee received the advance notice of the action).

f. State that this is the official's final decision.

g. State that, within 21 calendar days of the receipt of the final decision, the employee may initiate, under the provisions of this directive, an appeal of the action taken. Any appeal submitted must contain a statement that the employee either does or does not desire an evidentiary hearing. The employee should also be advised that assistance on the format and procedures involved in filing the appeal may be obtained from the servicing personnel office.

h. Advise the employee of his right to be represented by counsel or any other individual secured by the employee at his expense in presentation of his appeal.

84. The final decision will be furnished the employee by one of his supervisors. The time and date of delivery will be noted on a copy to be retained by the official making the final decision. If the employee is absent, the final decision will be sent to him at the last-known address by certified mail, return receipt requested.

85. An appeal from a final decision must be submitted within 21 calendar days of the employee's receipt of the written final decision. Upon request. the appellant will be provided assistance by the servicing personnel office in preparing a written appeal. Neither the appellant nor his representative will be intimidated or coerced in an effort to discourage the appellant from exercising his

right to appeal, nor will an appellant or his representative be discriminated against or reprisals be taken because of the exercise of such right. If the appellant chooses to be represented by an AAFES empoyee, and if the employee selected by the appellant consents and is determined, by appropriate authority, to be reasonably available, such employee will be made available. If an AAFES employee is so designated, he may have reasonable time off from his duties for the purpose of representing the appellant. AAFES employees assigned to the office of the General Counsel, to personnel duties, or to security duties may not serve as the appellant's representative. Appellants may not have more than two representatives including legal counsel. If the appellant has two representatives, one must be designated as his lead representative.

86. Disciplinary adverse actions which may be appealed under the procedures prescribed in paragraphs 81 through 98 of this directive are:

a. Suspension without pay for more than 30 calendar days.

b. Separation for cause.

c. Withdrawal of EMP status, except for declination of transfer or for unsatisfactory performance.

87. Nondisciplinary adverse actions which may be appealed under the procedures prescribed in paragraphs 81 through 98 of this directive are:

a. Downgrade or reduction in compensation except terminations of temporary promotions, terminations of details, or as a result of rehire.

b. Separation for RIF.

c. Separation for disability or for maternity.

d. Downgrade or reduction in compensation for unsatisfactory performance.

e. Withdrawal of EMP status for unsatisfactory performance.

f. Separation for unsatisfactory performance.

88. The adverse actions set out in paragraphs 86 and 87 above are the only adverse actions from which an employee may appeal under the procedures prescribed in paragraphs 81 through 98 of this directive. Except for the adverse actions set out in 87d, e and f above, appeals from nondisciplinary actions may be made only on the basis of procedural errors or discrimination, other than discrimination which would be a basis for consideration under equal employment opportunity procedures.

89. If an employee desires to appeal an adverse action, he must address his appeal to the appellate authority through the official

making the final decision and the management official, if they are not one and the same. The appeal may contain affidavits, documentary evidence and arguments in support of the employee's appeal; and must contain a statement that the appellant does or does not desire an evidentiary hearing. The name and address of the appellant's representative, if any, must also be stated in the written appeal. The appellant must state the basis for his appeal in sufficient detail to permit a hearing examiner to understand the basis. He must also state the remedy requested, which must be personal to him. The issues to be brought before a hearing will be limited to those set forth by the appellant in his written appeal; however, the appellant may, by letter received by the hearing examiner 10 or more workdays prior to the date set for the convening of the hearing on the appeal, amend his appeal to add new issues. A copy of any letter amending an appeal must also be sent to the management official at the same time it is mailed or delivered to the hearing examiner.

90. Upon receipt of an appeal from an adverse action, the management official will, within five workdays of receipt of the appeal, forward the entire file to the hearing examiner. The file forwarded will include the appeal, together with all evidence submitted by the appellant, the evidence upon which the final decision to take the adverse action was based, and a copy of the final decision notifying the appellant of the adverse action.

91. Upon receipt of an appeal from an adverse action, the hearing examiner will ascertain whether the appeal is in accordance with the requirements of paragraphs 81 through 98 of this directive. If it is ascertained that the appeal does not comply with these requirements, the hearing examiner will return the appeal to the appellant with a written explanation as to why it was not accepted and, where applicable, refer to the paragraph or paragraphs of this directive that are the basis for not accepting the appeal. The appellant will be given five workdays from date of receipt of the hearing examiner's letter to resubmit his appeal. If the employee fails to resubmit his appeal within five workdays, the appeal will be considered withdrawn. The determination of the hearing examiner regarding acceptance of an appeal is final and not subject to further appeal or review. The determination of the hearing examiner will be forwarded through channels to the employee with a copy to the management official and to the official making the final decision.

92. If the employee does not affirmatively request an evidentiary hearing, a recommendation on the appeal may be rendered by the

hearing examiner on the relevant evidence submitted. However, the hearing examiner may request additional evidence from either the appellant or the official making the final decision prior to making a recommendation.

93. If the employee affirmatively requests an evidentiary hearing or if the hearing examiner determines that an evidentiary hearing is necessary, a hearing will be conducted by a hearing examiner.

94. *Preparating for hearing.* The management official will select an individual to prepare and present the case for management. The appellant and the management official will notify the hearing examined in writing of the names and addresses of their representatives in advance of the hearing.

a. The management official will provide facilities, including recording equipment and a court reporter or stenographer, as determined necessary by the hearing examiner, and will perform other related functions as prescribed by the Commander, AAFES.

b. The hearing examiner is authorized to consult with the appellant and the management official and/or their representatives on an informal basis in advance of the hearing in order to clarify the issues, attempt an informal resolution, secure agreement as to certain undisputed facts, and attempt to narrow the issues to be considered during the hearing.

95. *Hearing examiners.* A hearing examiner will be responsible for establishing the date, time, and place of the hearing, and for giving advance notice in writing to all persons concerned in the case, with instructions regarding the nature of their participation. Such notice will include: the date, time, and place of the hearing; a statement of the purpose of the hearing and of the right of both the appellant and management to produce evidence in their behalf in documentary form, or by testimony of witnesses; a statement of the right of both the appellant and management to secure assistance and information from the servicing personnel office; and a statement advising the appellant of his right to have representation and his responsibility in arranging for that representation.

a. The hearing examiner will conduct the hearing in accordance with procedures prescribed and published by the Commander, AAFES. The functions of the hearing examiner are to identify the issues involved, to ascertain and acquire all relevant facts, to evaluate and weigh those facts, to make findings of fact, and to render a written recommendation on the appeal to the appellate authority. The hearing examiner will prepare a record

of the hearing which will include a verbatim transcript or, at his option, a summarized record of the hearing, a statement of the issues involved, appropriate findings of fact and a written recommendation, including recommendations for corrective action where required.

b. Evidence introduced during the hearing will be limited by the hearing examiner to matters material and relevant to the appeal. Strict adherence to the formal rules of evidence will not be required.

c. When all evidence has been obtained, including that contained in the transcript of the hearing when a hearing is conducted, the appeal and evidence will be reviewed by the hearing examiner. Unless further evidence is required, the hearing examiner will make a written recommendation on the merits of the appeal and transmit it to the appellate authority. The hearing examiner may recommend modification, if appropriate, of any action which has been taken. The hearing examiner may recommend appropriate corrective action to facilitate implementation of the recommendation.

96. *Record of hearing.* The transcript of any hearing will be prepared in duplicate. The original will be forwarded to the hearing examiner who conducted the hearing and the duplicate will be forwarded to the management official. A copy will be made available, by the management official, for the use of the appellant. The hearing record will include as a minimum:

a. The request for a hearing.

b. Notice of the hearing.

c. The transcript of the hearing with exhibits.

d. The hearing examiner's report which will include:

(1) A statement of the issues.

(2) A statement of the findings of fact.

(3) The hearing examiner's recommendation.

97. *Appellate authority.* a. The appellate authority is the Commander, AAFES or, in his absence, the Deputy Commander, AAFES. However, if the Commander, AAFES is the management official, the appellate authority will be the Chairman, Board of Directors, Army and Air Force Exchange and Motion Picture Services.

b. The appellate authority will secure the legal advice of his servicing General Counsel prior to rendering his determination except that, when the Chairman of the Board of Directors is the appellate authority, he will secure the legal advice of the Judge

Advocate General of the Army or of the Air Force, as appropriate, prior to rendering his determination.

98. *Determination by appellate authority.* The appellate authority will render a written determination on the appeal. The appellate authority may approve, disapprove, or amend the recommendation of the hearing examiner; return the case for further hearing; or return the case for corrective action. The written determination will, unless the hearing is to be reopened or unless other corrective action requiring further review is to be taken, include a statement that the determination by the appellate authority is final and not subject to further appeal or review.

a. One copy of the determination will be forwarded to each of the following: the appellant, the hearing examiner, the management official, and any intermediate headquaters, as appropriate.

b. In the event a rehearing or further review is ordered, processing of the appeal will continue in accordance with paragraphs 94 through 98, as appropriate.

* * * * *

20. Advance notices of separation will be in writing, will provide for at least 30 calendar days' notice (unless a lesser period of advance notice is provided in Annex A), and will state:

a. The type of separation, including reference to the appropriate paragraph in this directive under which the separation action is taken.

b. The basis for the separation. The facts supporting the basis for separation must be stated specifically and in detail, with sufficient information (such as dates, places, events, names, etc.) to ensure that the employee understands the reasons for the proposed action and to afford him a fair opportunity to respond.

c. The proposed effective date of the separation. (All separations will be effective as of the close of business.)

d. That the employee has the opportunity to explain the circumstances and his views.

e. That the employee has a right to submit a reply orally and/or in writing and in the reply to set forth any matters, explanations, or denials the employee deems to be appropriate. (The employee will be afforded the opportunity to be accompanied by a representative during his oral explanation if he so requests. Any expense involved in making an oral reply will be borne by the employee.)

f. That the reply must be filed within five workdays of receipt of the advance notice of the proposed action but, that upon good

cause shown, the official with authority to separate may extend the period to reply up to an additional five workdays or a total period not to exceed ten workdays from the employee's receipt of the advance notice of the proposed action, provided the request for extension is received within five workdays of the employee's receipt of the advance notice.

g. Identify the official to receive the written or oral reply.

h. Advise the employee that his reply to an advance notice of separation will be given full consideration before a final decision is made.

i. Inform the employee that a written final decision will be made within 10 workdays of receipt of his reply or, if no reply is made within the authorized reply period, a final decision will be made following expiration of the authorized reply period.

21. Upon receipt of the employee's reply to an advance notice of separation, and after giving it full consideration, the official with authority to separate will advise the employee of the final decision in the matter. If, after considering the reply, the official with authority to separate has made a decision to take an action other than separation, he will advise the employee of the action to be taken. A new advance notice of the action to be taken is not necessary.

22. If the final decisions is to separate the employee, the decision will be in writing and will state:

a. The type of separation.

b. The basis for the separation.

c. The effective date of separation. (The effective date of separation must be after expiration of the advance notice period for the separation action.)

d. That full consideration was given to the employee's oral and/or written reply or, if no reply was received, state that no reply was received.

e. State which of the reasons in the advance notice of separation were resolved in favor of the employee and which against the employee. (The final decision will not add to the reasons stated in the advance notice.)

f. That this is the official's final decision.

g. That, within 21 calendar days following receipt of the final decision, the employee may initiate a complaint or a grievance under paragraphs 66 through 80 of this directive, or appeal of an adverse action under paragraphs 81 through 98 of this directive, whichever is appropriate, unless a complaint, grievance, or appeal

of an adverse action is otherwise excluded under the provisions of paragraph 3 of this directive.

h. That Federal Unemployment Compensation may be available. (He will be advised of the nearest office where he may seek advice.)

APPENDIX B

ARMY REGULATION No. 60–21/AIR FORCE REGULATION No. 147–15 (MAY 14, 1959) provided in pertinent part

* * * * *

7. Civilian personnel. *a.* Exchange personnel are employees of an instrumentality of the United States which is an integral part of the Department of Defense. Since they are compensated out of nonappropriated funds, they are distinguished from other civilian employees of the Armed Services who are compensated from appropriated funds. *For example,* they are not held or considered as employees of the United States for certain purposes, such as the civil service laws and the Federal Employees Compensation Act (5 USC 150k). Compensation benefits for death or disability incurred in the course of employment are provided, however, for exchange civilian employees by AAFES in accordance with the provisions of the Nonappropriated Fund Employees Act (5 USC 150k–1). Civilian employees of AAFES are also entitled to benefits under the Federal Unemployment Compensation Act (AR 230–117 and AFR 176–3).

b. Policies, programs, and procedures governing the administration of civilian employees of the AAFES will be established by the Chief, AAFES, in accordance with the objectives of the Act of 19 June 1952 (5 USC 150k) and basic policies approved by the Board of Directors, AAFEMPS. See AR 60–21/AFR 147–15 and AR 60–29/AFR 147–23.

c. The official time of a civilian employee paid from appropriated funds may be used in the command supervision of exchanges but will not be authorized in the operations of exchanges.

d. Security clearance for civilian personnel.

(1) *Installation.* Army or Air Force regulations concerning nonappropriated fund civilian personnel security investigations and adjudications apply to Exchange Service personnel employed at installations of the Army and the Air Force, respectively.

(2) *Headquarters, A&AFES and service centers.* Security investigations and clearances of employees of Headquarters, A&AFES and service centers will be processed in accordance with AR 230–15 and AR 604–5. In addition—

(*a*) With respect to paragraph 19, AR 604–5, the Chief, A&AFES, is authorized to clear personnel within his specific area of jurisdiction for access to classified defense information, after appropriate investigation required by Army regulations has been accomplished. The Chief, A&AFES, may redelegate this authority to chiefs of service centers for personnel within their respective offices.

(*b*) The Chief, A&AFES, and chiefs of service centers will undertake the responsibilities prescribed in paragraph 10, AR 230–15, concerning employees in their respective offices and will furnish the required recommendations to the major commander responsible for the geographic area in which the office is located.

* * * * *

11. Appointments. Appointments of A&AFES employees will be made as follows:

a. Approval of appointments to Executive Management positions will be in accordance with chapter 7.

b. Appointments under the Universal Salary Plan

of Headquarters, A&AFES, and Service Center personnel who are not covered by the Executive Management Program will be subject to approval by the Chief, A&AFES. In exchange systems appointments under the Universal Salary Plan of personnel who are not covered by the Executive Management Program will be subject to approval by the responsible oversea major commander.

c. Appointments to positions under the Annual Salary Plan will be subject to approval by the installation commander, or his delegated representative upon recommendation of the exchange officer.

d. Appointments to positions under hourly wage schedules will be subject to the approval of the installation commander or his delegated representative.

* * * * *

25. Authorized payment. *a.* Payment of wages or salary to employees will be made in accordance with the employee's correct and currently approved grade and at the applicable rate specified on the appropriate wage or salary schedule authorized by the Chief, A&AFES.

b. Commission employees will be paid in accordance with the commission plan authorized by the Chief, A&AFES.

c. Local payment of earned salary or wages may be made at an employee's request in emergency situations involving death, accident, or serious illness in his immediate family or when delay occurs in receipt of his payroll check.

* * * * *

48. Involuntary separations. Involuntary separations are terminations of employment initiated by proper authority.

a. Notice periods.

(1) Employees serving in a probationary period may be separated at any time during that period without prior notice. In these separations employees will not have recourse to the grievance procedure.

(2) At the discretion of the responsible commander, pay in lieu of notice may be made for involuntary separations for other than cause. The following notice periods will apply (except as noted in (1) above) for involuntary separations other than for cause.

(*a*) Employees coming under the Universal Salary Plan (except as noted in (*b*) below) and Annual Salary Plan will be given 30 days' advance notice while in a pay and duty status if employed more than 1 year. Employees in these categories employed less than 1 year will be given 2 weeks' notice while in a pay and duty status.

(*b*) Executive Management Status employees will be given notice as set forth in chapter 7.

(*c*) All regular full-time and part-time hourly wage-schedule employees will be given 2 weeks' advance notice while in a pay and duty status.

(*d*) Employees in other categories may be given notice at the discretion of the exchange officer.

b. Executive Management Status employees. All involuntary separations of Executive Management Status employees will be coordinated with the Chief, A&AFES, in accordance with chapter 7. Separation procedures, including terminology, will be the same for all categories of personnel except where noted otherwise.

c. Inefficiency separations. Inefficiency separations will be made in accordance with paragraph 33.

d. Reduction in force. The following provisions apply in reduction in force, except for Executive Management Status employees covered in chapter 7:

(1) When the work requirements of an exchange necessitate abolishment of positions, the exchange officer will select the individuals to be released, basing selection upon the relative performance, potential, length of service, and veterans status, in that order, of all incumbents of positions identical or closely related to those being abolished.

(2) Before final separation of any employee selected for release, he should be considered for reassignment to all other positions in the exchange for which qualified.

(3) No employee affected by a reduction in force will be required to accept a different position or employment category. If an employee refuses an offer of a different position or employment category, the action separating the employee will be processed as a reduction in force.

(4) All notices of separation will be in writing, addressed to the employee concerned, and will contain the date of scheduled separation and the reason for it. When circumstances prevent the prescribed full period of notice being given, the employee will be granted pay for the balance of the required notice period.

e. Separation for disability. An employee may be separated for reasons of disability if at any time his physical or mental condition renders him incapable of performing the duties of his position for any indefinite period of time.

(1) Regular full-time employees separated for disability will be authorized payment of accrued sick leave until such leave has been exhausted (par. 69*h*). Use of sick leave in such cases will be in addition to regular notice periods authorized in *a* above.

(2) Employees whose disability was caused by intemperance or immoral or reckless conduct will not be

entitled to disability sick leave benefits or advance notice of separation. Decision in every case will be made by the commander concerned.

f. Discharge for cause.

(1) An employee may be discharged for cause for misconduct, delinquency, or for an act of conduct incompatible with continued employment. Repeated infractions that individually merited only a reprimand or other disciplinary action may be the basis for discharge for cause.

(2) Generally, an employee discharged for cause will be given 5 workdays advance notice of the intended discharge, or pay in lieu of notice. The advance notice or pay will be at the discretion of the exchange officer, depending upon the circumstances in each case. Whenever danger to life, well-being of individuals, or damage to property is involved, the employee will be separated without prior notice.

(3) The charges against an employee will be submitted to the personnel manager, or the person delegated responsibility for personnel functions, who will investigate them thoroughly and recommend to the exchange officer approval or disapproval of proposed discharge, giving all supporting facts disclosed by the investigation.

(4) If the discharge is approved, the exchange officer will advise the supervisor and initiating authority of the action and will notify the employee in writing, giving in the letter a complete statement of charges, the scheduled date of separation, and advising him of his rights under the grievance procedure. Employees will be requested to sign and return a copy of the proposed discharge as evidence that they have read the charges made and understand the reason for the discharge.

(5) If the discharge is not approved, the initiating official will be given the reasons for the decision reached.

g. Grievance procedure for involuntary separations.

(1) Employees separated involuntarily will be advised of their rights of appeal under the grievance procedure (sec. IV, ch. 5) and every assistance in preparing grievances will be given those employees by exchange personnel offices.

(2) Separation actions which cannot be appealed under the grievance procedure include disability and security separations.

* * * * *

92. General. The grievance procedure provides uniform treatment in matters affecting aggrieved employees and promotes sound employer-employee relations by requiring supervisors to make proper and responsible decisions in personnel matters. All exchange employees will be given opportunity to discuss problems with their supervisors and be free from restraint, interference, coercion, discrimination, or reprisal in filing grievances. All elements of the A&AFES will make known in writing to each of its employees that grievance procedures exist as an employee right.

93. Scope. These provisions are applicable to all exchange employes within CONUS and all United States citizen A&AFES employees wherever located. Officers in charge of exchange systems are authorized to make deviations in procedures when necessary and when required by major oversea command policy; however, the basic grievance requirement will not be abrogated through any procedural or administrative change.

94. Rights of an aggrieved employee. An aggrieved employee has the right to—

a. Present grievances to supervisors and officials on all matters except separation during probationary period, wage and salary schedules, and disability and security separations. As prescribed in paragraph 10, AR 60–20/AFR 147–14, complaints concerning discrimination in employment will be processed in accordance with the applicable provisions of AR 230–5 or AFR 176–1.

b. Be fairly and promptly heard and receive equitable consideration.

c. Designate a member of the grievance committee

d. Be afforded the assistance of the personnel manager, or the person delegated responsibility for personnel functions, in preparing his original case and appeal.

e. Be granted a hearing before a grievance committee.

f. Examine witnesses and reply to any adverse testimony or written evidence presented.

g. Be represented at the hearing by any person or by legal counsel from outside the exchange at his own expense.

h. Examine the reported minutes of the hearing and exhibits and make such extracts as deemed necessary.

i. Attend hearings without salary loss, penalty, or charge against leave (provided the employee has not been separated) except that, for sufficient cause, an employee may be placed in a leave without pay status through a proper suspension action. Employees may also use official time in reasonable amounts for securing advice on rights under applicable regulations, arranging for witnesses, or for obtaining other information or assistance which can only be obtained during normal duty hours.

j. Call witnesses and have representatives attend hearings without loss of pay or charge against leave, if they are employees of the A&AFES, provided in the opinion of the installation commander such witnesses are essential to the hearing and their testimony cannot be obtained through other means.

k. Appeal an adverse adjudication to proper higher authority.

l. So far as possible under law and regulations, be granted appropriate remedial action when a grievance is resolved in his favor.

95. Grievance procedure. Grievances will be settled as follows:

a. An employee who has a complaint will first report to his immediate supervisor. The supervisor will make every reasonable attempt to resolve it.

b. Should the employee be dissatisfied with the decision rendered by his immediate supervisor, he will present his complaint orally to the next higher supervisor who will informally investigate the facts of the case and attempt to resolve it.

c. If the complaint is against the immediate supervisor or if the employee believes that discussion of his complaint would be prejudicial to his interests, he may, after notifying his immediate superior, present his complaint directly to the next higher supervisor.

d. If the next higher supervisor does not satisfactorily adjust the complaint, the employee may present his complaint to the exchange officer for personal adjustment.

e. If the decision of the exchange officer is not acceptable to the employee, he may request a grievance hearing in writing through the exchange officer to the installation commander for the establishment of a committee (par. 96) to hear his grievance and make

recommendations. The request will contain a clear and concise statement of his grievance and the relief sought.

f. The provisions of *a* through *e* above will not preclude any employee from immediately requesting a grievance hearing in writing through the exchange officer to the installation commander, if the employee believes the nature of his grievance is such that it cannot be resolved by discussion with the supervisors.

g. A grievance will not be considered when it is submitted more than 21 calendar days after the receipt of any adverse personnel action or 21 calendar days after the incident which was the cause of the grievance.

96. Establishment of grievance committee. *a.* A grievance committee composed of three members not subordinate to the aggrieved employee will be established by the installation commander. Members will be selected as follows: one member will be selected by the aggrieved employee; one member by the installation commander; and the third member will be selected by the other two. The member designated by the installation commander may be a commissioned officer or a civilian exchange employee; the other two members of the committee will be civilian exchange employees. The installation commander will designate as chairman the individual considered best qualified to direct a fact-finding body. The chairman will designate one of the members as recorder. The personnel manager or his representative will serve as advisor to the committee with respect to pertinent procedures, rules, and regulations but will not in any case serve as a voting member of the committee.

b. When insufficient civilian employees are available at the installation to constitute a grievance com-

mittee in accordance with *a* above, the Chief, A&AFES, will make available to the installation commander a list of employees from neighboring exchanges. In oversea areas this list will be provided by the major commander concerned.

97. Functions of grievance committee. The committee is a fact-finding and advisory body. It has one primary purpose, which is to assist the installation commander in arriving at a prompt and fair decision by making a full and complete evaluation of the evidence in the case, by impartially appraising the evidence, and by forwarding to the installation commander a record of the hearing proceedings, a statement of the committee's findings, and its recommendations.

98. Preparation for hearing. a. The supervisor involved or any individual other than the exchange officer, can be designated to prepare and present the case for management.

b. The committee chairman will be responsible for giving advance notice in writing to all persons concerned in the case, with instructions regarding the nature of their participation. Notices will include date, time, and place of the hearing; a statement of the purpose of the hearing and of the right of both sides to produce evidence in their behalf in documentary form or by testimony of witnesses; a statement of the right of both sides to secure assistance and information from the personnel office and of the right of the aggrieved employee to have representation and his responsibility in arranging for that representation.

c. The grievance committee will meet at the call of the chairman and as often as necessary to complete the hearing and prepare its report.

99. Hearing procedures. Hearings will be conducted according to the following procedures:

a. Attendance at open sessions will be confined to those who have a legitimate interest in the proceedings as determined by the chairman, except that public hearings may be held at the discretion of the installation commander.

b. Introductory remarks by the chairman will include—

(1) Statement of purpose of the hearing.

(2) Introduction of committee members and participants.

(3) Brief statement of the case.

(4) Statement that burden of proof of grievance is upon complaining employee.

c. The chairman will advise committee members to—

(1) Act as a fact-finding body and avoid any semblance of a trial.

(2) Examine all individuals concerned in a manner that will obtain all relevant and material facts necessary for completion of the record.

d. Hearings will be conducted so as to encourage a frank and open discussion of all relevant facts. Legal rules of evidence will not be observed.

e. Documentary evidence to be introduced as exhibits will be identified and shown to the committee and all interested persons before being received in evidence.

f. Testimony of witnesses appearing before the committee may be recorded verbatim or in summarized form. The appointment of a hearing stenographer or reporter is authorized at the discretion of the installation commander.

g. The aggrieved employee will be permitted to testify in his own behalf, introduce documentary evi-

dence, call witnesses and to cross-examine adverse witnesses.

h. Witnesses will be excluded from the hearing except while giving testimony.

i. The chairman will advise witnesses in the case—

(1) To confine testimony to matters relevant to the case and to avoid discussion of extraneous issues.

(2) To introduce all evidence or other testimony at the hearing. It is important that all relevant material be included in the event of review by higher authority.

(3) That testimony must be clearly identified as being based either on hearsay or personal knowledge.

(4) If testimony refers to a conversation or occurrence, to state the date, place, and persons present at the conversation or occurrence.

j. Testimony will be given in the following order:

(1) By the employee and his witnesses, if any, subject to cross examination by management.

(2) By management and its witnesses, if any, subject to cross examination by the employee.

(3) Rebuttal.

(4) Summary.

k. Prior to adjournment, the chairman will advise all persons concerned that they may make any additional statement which they consider necessary to complete the record.

l. Upon completion of the hearing, the committee will meet in closed session, evaluate the evidence, formulate findings and recommendations, and prepare a report.

(1) The report and exhibits will be prepared (in quadruplicate) in the following manner: Pages will be numbered at the bottom; erasures, interlineations, and other changes will be initialed by the recorder or a member of the committee; an index will be attached giving a list of witnesses, page numbers of testimony,

and brief description of each exhibit, its designation by letter and page where introduced.

(2) The findings recorded will be a brief, coherent, and clear recital of the facts established by the evidence.

(3) Recommendations must be appropriate to and warranted by the findings and should include action to resolve the grievance.

(*a*) Recommendations will be determined by majority vote of the committee members.

(*b*) In case of disagreement between members of the committee, any member may enter in the report his dissent and the reason for the dissent.

(4) Reports will be signed by all members of the committee.

(5) Upon completion of its hearings, the committee will submit its report to the installation commander. The installation commander will determine the action to be taken and forward his decision in writing to the employee, through the exchange officer, within 10 calendar days and advise him of his rights of appeal.

(6) The grievance committee is not authorized to furnish its report or copies of it to anyone other than the appointing authority.

100. Rights of appeal. *a.* If the employee does not accept the decision of the installation commander he may appeal the decision in writing within 15 calendar days after receipt of the decision, with the reasons therefor, through channels to the major commander concerned whose decision will be final.

b. Major commander may approve, disapprove, or amend the proposed settlement, or determine that the case should be reopened and further investigation and hearing be made, and will prescribe in detail further action which will be taken including necessary pay

adjustment, reinstatement, or other appropriate action.

c. The decision of reviewing officials within CONUS will be communicated to the exchange officer through channels within 15 calendar days following receipt of the appeal, and the employee will be immediately notified in writing of the decision made. In oversea reviews, the time will be determined by the responsible commander.

101. Executive Management Status Employees. *a.* In cases where Executive Management Status Employees are separated, a complete copy of the grievance report, appeal, and determinations will be forwarded to the Chief, A & AFES. Such employees may request the Chief, A & AFES to review the proceedings and determine eligibility for further employment as an Executive Management Status Employee.

b. The civilian members of the grievance committee will be Executive Management Status Employees.

APPENDIX C

UNITED STATES COURT OF CLAIMS

WASHINGTON, D.C.

Court of Claims No. 342-72

ROY C. HOPKINS V. UNITED STATES

STATE OF TEXAS,
County of Dallas, ss:

Colonel Robert Burns, USAF, General Counsel of the Army and Air Force Exchange Service, organized and existing under the regulations of the Army and Air Force of the United States, with headquarters in Dallas, Texas, deposes and says that the Plaintiff, Mr. Roy C. Hopkins, was appointed to employment with the Army and Air Force Exchange Service on 18 April 1958 and that appended hereto is a true copy of Mr. Hopkins' Army and Air Force Exchange Service Employee Service Record Card.

Dated in Dallas, Texas, on this the 18th day of July, 1973.

(s) ROBERT BURNS,
Colonel, USAF,
General Counsel.

Subscribed and sworn to before me on this the 18th day of July, 1973.

(s) JOANNA MUIR,
Notary Public in and for
Dallas County, Tex.

EMPLOYEE SERVICE RECORD CARD--ARMY AND AIR FORCE EXCHANGE SERVICE

RECORD OF EMPLOYMENT WITH THE EXCHANGE SERVICE

Type of action	Effective date	Title of position	Position No.	Grade and step	Pay rate	Type of employment	Br. No.	Employing exchange or administrative unit
Appointment	Apr. 10, 1958	Security inspector	009	11-1	5,680	RFT		Hq AFEX, Insp Svcs, mz-kastel Germ
Init Transp/Agreem	Apr. 10, 1958	Do.	009	11-1	5,680	RFT		Do.
Reassignment	July 7, 1958	Inspector	009	11-1	5,680	RFT		Do.
Conv to USP	Oct 24, 1958	Do.	009	10-1	6,100	RFT		Do.
Stp Advance	Feb. 11, 1960	Do.	012	10-2	6,400	RFT		Do.
Partic. in Ret. Plan	May 1, 1960	Do.	012	10-2	6,400	RFT		Do.
Reassin/Promotion	Aug. 8, 1960	Senior inspector	011	11-1	6,700	RFT		Do.
Conversion	Sept. 9, 1960	Do.	011	11-1	7,300	RFT		Do.
Transfer	Aug. 26, 1961	Chief, inspection and Security	U-013	11-1	7,300	RFT		Det 400, West Ruislip, England
Conversion	Oct. 18, 1962	Do.	U-013	11-1	8,045	RFT		Do.
Conversion	Jan. 9, 1964	Do.	402	11-1	8,410	RFT		Do.
Revision Grp/Insur	Mar. 1, 1964	Do.	402	11-1	8,410	RFT		Do.
Merit step in/Grp Insur	Mar. 5, 1964	Do.	402	11-2	8,785	RFT		Do.
Sal. Conv	July 9, 1964	Do.	402	11-2	9,030	RFT		Do.
Change Title	May 27, 1965	C/Safety and Security	402	11-2	9,030			United Kingdom Area Ex/W. Ruslip
Sal. Conv	Oct. 14, 1960	Do.	402	11-3	9,573			Do.
W-G-S-I	Mar. 3, 1966	Do.	USP	11-4	9,879			EES/United kindom AX/S & S Br.
Job Title Chg	Apr. 1, 1966	C/area Safety Security branch	USP	11-4	9,879			Do.
Sal. Conv	July 7, 1966	Do.	USP	11-4	10,166	USP-11		Do.
Do.	Oct. 12, 1967	Do.	USP	11-4	10,623	USP-11		Do.
W-S-S-I	Feb. 29, 1968	C/area S & S BR	USP	11-5	10,945	USP-11		EES/United Kingdom AX
Sal. Conv	July 4, 1968	Do.	USP	11-5	11,563	USP-11		Do.
Sep. F. Cause	Aug. 6, 1968	Do.	USP	11-5	11,563	USP-11		Do.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-246

UNITED STATES OF AMERICA, *Petitioner*

v.

ALICE R. HOPKINS, Special Administrator, *Respondent*

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

	Page
Opinion Below	1
Question Presented	1
Statute Involved	2
Statement	3
A. Background of Case and Facts	3
B. Evolution and Present Composition of Exchange Services	4
C. Précis of Judicial Decisions Involving Nonappropriated Fund Activities	8
D. Legislative History	18
Argument	30
Summary	30
I. Respondent Was An Exchange Service Contract Employee Entitled Under the 1970 Tucker Act Amendment To Sue In The Court Of Claims For Breach Of Employment Contract And The Court Of Claims Holding To This Effect Should Be Upheld	31
II. Petitioner's Contentions That Exchange Service Employees Have No Contract Or Other Employment Rights Are Anachronistic And Contrary To The Intent Of Congress And Prior Precepts Of This Court	41
(a) Tucker Act provides substantive right to suit	42
(b) Civil Service statutes are not affirmative bars to suit	43
(c) Regulations and due process as basis for suit	46

Page

(d) Lack of explicit reference in legislative history is not significant 48

(e) Pre-1970 non-jurisdiction holdings no longer valid 50

III. Respondent's Claim, Irrespective of Its Contract Basis, Is Founded Upon The Constitution, Acts Of Congress, And Regulations, And Is For Non-Tort Damages 51

(a) United States is now fully liable for Exchange Service activities 51

(b) Respondent's claim for discharge in violation of executive regulations is an enforceable claim against the United States under the Tucker Act 52

(c) Respondent's claim is also founded on Fifth Amendment and Administrative Procedure Act and is, therefore, within the jurisdiction of the Court of Claims. 54

Conclusion 55

TABLE OF CITATIONS

U.S. Constitution:

Article II, § 2 40

Amendment V 30, 46, 47, 48, 54

Amendment XIV 47

Statutes/Code:

Act of March 2, 1821, 3 Stat. 615 5

Act of July 28, 1866, c. 299, 14 Stat. 336 5

Joint Resolution of March 30, 1867, 15 Stat. 29 5

Act of January 28, 1893, c. 51, 27 Stat. 426 5

Page

Army Appropriations Act, 1904, 32 Stat. 927 6

Act of February 18, 1904, c. 160, 33 Stat. 15 14

Act of March 3, 1911, c. 231, 33 Stat. 1087 14

Army Appropriations Act, 1919, 40 Stat. 845 ..... 6, 7

Act of June 10, 1921, c. 18, 42 Stat. 20 14

Act of June 19, 1952, c. 444, § 1, 66 Stat. 138, 5 U.S.C. § 2105 44

Act of August 10, 1956, c. 1041, 70A Stat. 270, 10 U.S.C. §§ 4779(c), 9779(c) 7

Act of August 19, 1972, § 1(a), 86 Stat. 564, 5 U.S.C. § 5342(a)(1) 35

Administrative Procedure Act, 5 U.S.C. § 701 54

Back Pay Act, Pub. L. 90-83, 81 Stat. 201, 5 U.S.C. § 5596 ..... 41, 43, 45

Federal Tort Claims Act, 28 U.S.C. § 1346(b), § 2671 .. 16, 35, 39

Floyd-LaFollette Act, Act of August 24, 1912, c. 389, 37 Stat. 555, 5 U.S.C. § 7501 ..... 41, 43, 44, 47, 53

Supplemental Appropriation Act of 1957, 70 Stat. 694, 31 U.S.C. § 724 2

Tucker Act, as amended 84 Stat. 449, 28 U.S.C. § 1346 (a), 28 U.S.C. § 1491 ..... 2, 3, 4, 6, 15, 18, 30, 31, 41, 53

5 U.S.C. § 2104, Officer 35
§ 2105, Employees 34, 37, 44, 45
§ 3105, Hearing Examiners 35
§ 5531, Dual Compensation Act 46
§ 7902, Safety programs 46
§ 8501, Unemployment compensation 46

10 U.S.C. §3012, Secretary of Army 7
§ 8012, Secretary of Air Force 7

Page

18 U.S.C. § 1001, False statements 17, 18

28 U.S.C. § 1442(a), Removal of suit 9
§ 2517, Payment of Judgments 14

REGULATIONS:

3 C.F.R. (1966-70 Comp.) § 862 46

32 C.F.R. (1972 ed.) § 554 et seq. 7

AR 60-21/AFR 147-15 ..... 37, 46, 48

ARTICLES OF WAR AND GENERAL ORDERS:

Articles of War, 1775, Winthrop, Military War and Precedents (2d ed. 1920) 4

Article 41, General Regulation of Army, 1821 5

General Order No. 10, February 1, 1889 5

General Order No. 51, May 13, 1890 5

General Order No. 11, February 8, 1892 5

General Order No. 46, July 25, 1895 6

Circular No. 5, January 23, 1902, Headquarters of the Army 52

CASES:

American Commercial Co. v. *U.S. Officers, et al.*, 187 F.2d 91 (D.C. Cir. 1951) 17

Arnett v. *Kennedy*, 416 U.S. 134, 40 L.Ed. 2d 15 (1974). 47

Aubrey v. *United States*, 254 F.2d 768 (D.C. Cir. 1958) 16, 35

Aycock-Lindsey Corp. v. *United States*, 171 F.2d 518 (5th Cir. 1948) 43

Bailey v. *United States*, 201 F. Supp. 604 (D. Alaska 1962) 17, 29

Batchelor v. *United States*, 169 Ct. Cl. 180 (1965) 53

Page

Bell v. *Burson*, 402 U.S. 535, 29 L.Ed. 2d 90 (1971) ... 47

Benton v. *United States*, 203 Ct. Cl. 263 (1973) 52

Bluer v. *United States*, 117 F. Supp. 509 (E.D.So.C. 1950) 16, 29

Board of Regents v. *Roth*, 408 U.S. 564, 33 L.Ed.2d 548 (1972) 46

Borak v. *United States*, 110 Ct. Cl. 236 (1948) 48

Borden v. *United States*, 126 Ct. Cl. 902 (1953) 11, 12, 15, 22, 23, 26, 29, 37, 49, 50, 52

Brethauer v. *United States*, 333 F.2d 302 (8th Cir. 1964) 17

Brummitt v. *United States*, 165 Ct. Cl. 78 (1964) 11, 13, 33, 34

Burnap v. *United States*, 252 U.S. 512, 64 L.Ed. 692 (1920) 39

Butler v. *Pennsylvania*, 51 U.S. (10 How.) 402, 13 L. Ed. 472 (1850) 32, 35, 53

Charlton v. *United States*, 412 F.2d 390 (3rd Cir. 1969) 54

Cockrill v. *United States*, 155 Ct. Cl. 181 (1961) 11

Compagnie General Transatlantique v. *United States*, 21 F.2d 465 (2d Cir. 1927) 43

Crenshaw v. *United States*, 134 U.S. 99 (1890) ... 32, 35, 40

Daniels v. *Chanute Air Force Base Exchange*, 127 F. Supp. 920 (E.D. Ill. 1955) 16, 24, 35

Dooley v. *United States*, 182 U.S. 222, 45 L.Ed. 1074 (1901) 43

Dugan v. *United States*, 34 Ct. Cl. 458 (1899) 6, 10

Eastport Corp. v. *United States*, 178 Ct. Cl. 599 (1967). 15

Edelstein v. *So. Post Officers Club*, 118 F. Supp. 40 (E.D. Va. 1951) 17, 29

Fleming v. *A. H. Belo Corp.*, 121 F.2d 207 (5th Cir. 1941), aff'd. 316 U.S. 624, 86 L.Ed. 1716, reh. den. 317 U.S. 706, 87 L.Ed. 563 32

G. L. Christian and Associates v. *United States*, 160 Ct. Cl. 1 (1963) 11

Goldberg v. *Kelly*, 397 U.S. 254, 25 L.Ed. 2d 287 (1970) 47

Page

Gradall v. *United States*, 161 Ct. Cl. 714 (1963) 11, 13, 33, 34
Guggenheim v. *United States*, 127 Ct. Cl. 121 (1953) .. 50
Keane v. *United States*, 272 F. 577 (4th Cir. 1921) 18
Keetz v. *United States*, 168 Ct. Cl. 205 (1964) ... 11, 12, 13, 15, 22, 23, 26, 29, 32, 33, 34, 49, 50
Keifer & Keifer v. *Reconstruction Finance Corporation*, 306 U.S. 381, 83 L.Ed. 784 (1939) 42
Kenny v. *United States*, 62 Ct. Cl. 328 (1926) 10
Kyer v. *United States*, 177 Ct. Cl. 747 (1966) 11, 12, 13, 14, 15, 22, 23, 26, 29, 49, 50
Kyle v. *United States*, 46 Ct. Cl. 197 (1911) 10
Morrissey v. *Brewer*, 408 U.S. 471, 33 L.Ed. 2d 484 (1972) 47
Nimro v. *Davis*, 204 F.2d 734 (D.C. Cir. 1953) 17
Paul v. *United States*, 371 U.S. 245, 9 L.Ed. 2d 292 (1963) 9
Polcover v. *Secretary of Treasury*, 477 F.2d 1223 (D.C. Cir. 1973) 54
Pulaski Cab Co. v. *United States*, 141 Ct. Cl. 160 (1958) 11, 12, 13, 15, 23, 26, 29, 49, 50
Ralston Steel Corp. v. *United States*, 169 Ct. Cl. 119 (1965), cert. den. 381 U.S. 950 (1965) 42
Service v. *Dulles*, 354 U.S. 363, 1 L.Ed. 2d 1403 (1957) 48, 53
Sniadach v. *Family Finance Corp.*, 395 U.S. 337, 23 L. Ed. 2d 349 (1969) 47
South Puerto Rico Sugar Co. Trad. Corp. v. *United States*, 167 Ct. Cl. 236 (1964) 43
Standard Oil Co. of California v. *Johnson*, 316 U.S. 481, 86 L.Ed. 1611 (1942) .. 6, 7, 9, 35, 36, 37, 40, 44, 45, 47, 53
Sullivan v. *United States*, 92 Ct. Cl. 154 (1940) 10
Swift-Train Co. v. *United States*, 443 F.2d 1140 (5th Cir. 1971) 17
Taylor v. *Beckman*, 175 U.S. 548 (1900) 32, 35, 40
United States v. *Becker*, 378 F.2d 319 (9th Cir. 1967) .. 39
United States v. *Emery, Bird, Thayer R. Co.*, 237 U.S. 28, 59 L.Ed. 825 (1915) 42

Page

United States v. *Hartwell*, 73 U.S. (6 Wall.) 385 (1868). 32
United States v. *Holcombe*, 277 F.2d 143 (4th Cir. 1960) 16, 24
United States v. *Howell*, 318 F.2d 162 (9th Cir. 1963). 17, 24
United States v. *Perkins*, 116 U.S. 483, 29 L.Ed. 700 (1886) 40, 48, 53
Urbina v. *United States*, 192 Ct. Cl. 875 (1970) 32
Vitarelli v. *Seaton*, 359 U.S. 535, 3 L.Ed. 2d 1012 (1959) 48, 53
Ward v. *Atlantic Coast Line R. Co.*, 265 F.2d 75 (5th Cir. 1959), rev'd. 362 U.S. 396 (1960) 32
Williams v. *United States*, 44 Ct. Cl. 175 (1909) 10
Woog v. *United States*, 48 Ct. Cl. 80 (1913) 10
Young v. *United States*, 498 F.2d 1211 (5th Cir. 1974).. 31, 35, 46, 48, 53, 54

LEGISLATIVE HISTORIES:

Senate Report No. 268, 91st Cong., 1st Sess. (1969) (Libr. Cong. 1-2:12834-2) 19, 23, 29, 36, 42
House Report No. 1995, 82d Cong., 2d Sess. 2 U.S. Code Cong. & Admin. News 1952 ..... 37, 44
House Report No. 91-933, 91st Cong., 2d Sess. 2 U.S. Code Cong. & Admin. News 1970 ..... 19, 26
H.A.S.C. No. 91-77, Report by the House Special Subcommittee on Exchanges and Commissaries of the Committee on Armed Services, 91st Cong., 2d Sess. (1970) 6, 7, 8
H.A.S.C. No. 92-75, Report by House Special Subcommittee on Nonappropriated Fund Activities Within the Department of Defense, of Committee on Armed Services, 92d Cong., 2d Sess. (1972).. 7, 8, 44, 51
Hearings on S. 3163 Before the Subcommittee on Improvements in Judicial Machinery, of the Senate Committee on the Judiciary, 90th Cong., 2d Sess. (1968) 19, 21

Page

Hearings on S. 980 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. (1969) 19, 21

Hearings on S. 980 Before Subcommittee No. 4 of the House Committee on the Judiciary, 91st Cong., 1st Sess. (1969) 19, 25, 27

115 Cong. Rec., Part 3, p. 3162, 91st Cong., 1st Sess. (1969) 21

115 Cong. Rec., Part 13, p. 17697, 91st Cong., 1st Sess. (1969) 25

116 Cong. Rec., Part 8, p. 10604, 91 Cong., 2d Sess. (1970) 27

116 Cong. Rec., Part 18, p. 24186, 91st Cong., 2d Sess. (1970) 25

MISCELLANEOUS:

53 Am.Jur.2d, Master and Servant 32, 40

243 AF JAG Reporter 15 (August 1, 1960) 16, 24

Wuliger v. *Headquarters,* 7408th Supply Group (Special Activities), Labor Court, Weisbaden, October 8, 1958, unreported 18, 24

United States Budget, 1975 8

Caesar, Alexandrian, African, and Spanish Wars, Wm. Heineman Ltd. 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-246

UNITED STATES OF AMERICA, *Petitioner*

v.

ALICE R. HOPKINS, Special Administrator, *Respondent*

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court of Claims dated March 19, 1975 is reported at 206 Ct. Cl. 303, 513 F.2d 1360, and appears as the Appendix to the Government's Petition herein.

QUESTION PRESENTED

Whether the Court of Claims has jurisdiction under the Tucker Act to entertain a suit against the United States for money damages for the improper discharge of an employee of a military exchange.

STATUTE INVOLVED

The Tucker Act, 28 U.S.C. § 1491, provides in pertinent part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. *For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.*

The italicized language was added in 1970 by Pub. L. 91-350, 84 Stat. 449, and is frequently referred to herein as the 1970 amendment.[1]

Portions of other referenced statutes and regulations are set forth in Appendices A and B to Brief of the United States, ¶ 1A-32A.

[1] Pub. L. 91-350 also added the identical language to 28 U.S.C. § 1346(a)(2), which grants the District Courts concurrent jurisdiction with the Court of Claims for claims not in excess of $10,000. And it added a proviso to § 1302 of the Supplemental Appropriation Act of 1957 (70 Stat. 694; 31 U.S.C. § 724(a)), that the Exchange Services "shall reimburse the United States for a judgment or compromise settlement paid by the United States."

STATEMENT

A. Background of Case and Facts

On August 6, 1968, respondent-plaintiff,[2] a retired Air Force enlisted man, was discharged involuntarily from civilian employment with the European branch of the Army and Air Force Exchange Service, a "nonappropriated fund" instrumentality of the United States. Respondent filed a complaint in the United States Court of Claims to recover back pay and other benefits lost by reason of the discharge, alleging therein that his employment

(i) "arose by virtue of a contract of employment between defendant's Exchange Service and plaintiff" (para. 4)

(ii) "and/or by virtue of appointment pursuant to regulations. . ." (para. 4),

and alleging further that his discharge

(i) "was a breach of plaintiff's contract of employment," (para. 15)

(ii) "was in violation of defendant's regulations and procedures," (paras. 12-13)

(iii) "was in violation of plaintiff's rights of due process," (para. 15)

(iv) "and was arbitrary and capricious." (para. 14).

[2] Roy C. Hopkins, plaintiff below, died on June 7, 1974, and by order of this Court dated December 8, 1975, his widow, Alice R. Hopkins, Special Administrator of his Estate by appointment in the Superior Court of California, County of San Diego, was substituted as party respondent. The decedent will be referred to as respondent.

Jurisdiction below was premised on the jurisdictional statute known as the Tucker Act, 28 U.S.C. § 1491, and the 1970 amendment thereto, namely, Pub. L. 91-350, § 1(b), 84 Stat. 449, quoted above.

Petitioner-defendant moved to dismiss on the procedural ground that no claim was stated within the jurisdiction of the court because respondent was neither a contract employee nor a federal employee entitled to judicial review of his discharge. The Court of Claims denied the government's motion and held that respondent's employment relationship with the Exchange Service was contractual and the 1970 amendment conferred jurisdiction for such a contract claim.

It has been and remains respondent's position that he is entitled to claim against the United States for his improper discharge either as a contract employee on the basis of the 1970 amendment, or, if not a contract employee, on the basis of the other Tucker Act provisions because the claim is one arising from the Constitution, statutes, executive regulations and/or for non-tort liquidated damages.

B. Evolution and Present Composition of Exchange Services

The Exchange Services are the ultimate successors to the itinerant merchants known as sutlers who, over the centuries, have followed armies selling items not furnished by quartermasters.[3] Congressional action

[3] Sutlers followed Caesar. (Caesar, Alexandrian, African and Spanish Wars, Wm. Heineman Ltd., London, MCMLV, Libr. Cong. Ref. PA 6156.A1—Lebienus harassed Caesar's rear guard and "by this means cut off the baggage trains of the sutlers and merchants who were carrying their wares in carts. . ."—at passage 75). The Articles of War of 1775 of the American Revolutionary Army specified the duties of sutlers. (Articles XXXII, LXIV, LXV and LXVI, Rules and Articles of War 1775, Appendix IX, Winthrop,

eliminated sutlers for the American military after, and apparently as a result of unsatisfactory conduct during, the Civil War and authorized establishment of "post traders" who were given exclusive trading licenses at various posts.[4]

Late in the same century, establishment of "canteens" by military units for supply and recreation purposes at locations having no post trader was authorized by Army regulation and these eventually proliferated.[5] In 1892, post canteens were redesignated post exchanges and the following year assumed functions of the post traders when Congress prohibited further appointment of the latter.[6]

In 1895, post exchanges were authorized by "Post Exchange Regulations" at all military installations "to supply the troops at reasonable prices with the articles of ordinary use, wear, and consumption not

Military Law and Precedents, 953 (2d ed., 1920, G.P.O.)) (E.g., Article LXIV at 958: "No suttler shall be permitted to sell any kind of liquors or victuals, or to keep their houses or shops open, for the entertainment of soldiers, after nine at night, or before the beating of the reveilles, or upon Sundays during divine service or sermon on penalty of being dismissed from all future suttling.") Congress approved the authorization of one sutler for each post or regiment as prescribed in Article 41 of General Regulations of the Army for 1821. (Act of March 2, 1821, 3 Stat. 615)

[4] Sutlers were eliminated by Congress in 1866. (Act of July 28, 1866, ch. 299, § 25, 14 Stat. 336) Post traders were authorized in 1867. (Joint Resolution of March 30, 1867, 15 Stat. 29)

[5] Canteens were established officially in 1889. (General Order No. 10, Feb. 1, 1889; Army Regs., Art. XXXIX) Restriction of canteens to locations lacking post traders was eliminated in 1890. (General Order No. 51, May 13, 1890)

[6] General Order No. 11, Feb. 8, 1892; Act of Jan. 28, 1893, c.51, 27 Stat. 426.

supplied by the government, and to afford the means of rational recreation and amusement."[7] This was done by the Secretary of War "under authority of Congressional enactments." *Standard Oil Co. of California* v. *Johnson*, 316 U.S. 481, 483, 86 L.Ed. 1611, 1615 (1942).

The post exchanges and the Navy's ship's stores (known collectively as Exchange Services) were integrated on a worldwide basis by the Secretaries of the military departments in 1956.[8] There are now five components of the system and these are named in Public Law 91-350 (the 1970 Tucker Act amendment): Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, and Exchange Councils of the National Aeronautics and Space Administration. (84 Stat. 449)

The Exchange Services have been continuously subsidized by appropriated funds since the authorization in 1895.[9] "Congress has repeatedly made substantial

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[7] General Order No. 46, Headquarters of the Army, July 25, 1895, quoted in *Dugan* v. *United States*, 34 Ct. Cl. 458, 462 (1899).

[8] H.A.S.C. No. 91-77, Report by the House Special Subcommittee on Exchanges and Commissaries of the Committee on Armed Services, 91st Cong., 2d Sess. (1970) (Libr. Cong. ref. KF32.A746), at 12350, 12383-84. (Report hereafter sometimes referred to as H.A.S.C. Rep. No. 91-77.)

[9] E.g., the fiscal 1904 Army Appropriations Act provided $500,000 for "continuing the construction, equipment, and maintenance of suitable buildings at military posts and stations for the conduct of the post exchange, school building, reading, lunch, amusement rooms and gymnasium. . ." Act of March 2, 1903, ch. 975, 32 Stat. 927 at 938. The fiscal 1919 Army Appropriations Act allotted $2,994,950 under Military Post Exchanges and provided that "not more than $629,000 of this appropriation may be expended for personal services and no person shall be employed

appropriations to be expended under the Secretary of War for construction, equipment, and maintenance of suitable buildings for post exchanges." *Standard Oil Co. of California* v. *Johnson, supra,* at 484.

The Army and Air Force Exchange Service is headed by a General Officer and overseen by a Board of Directors which reports directly to the Secretaries of the two services.[10] Government of the Exchanges is effected through regulations and circulars issued by the departmental Secretaries. (32 C.F.R. § 554.1 (1972)) These are promulgated pursuant to 10 U.S.C. §§ 3012 and 8012 which authorize the Secretaries of the Army and Air Force to conduct all affairs of the two departments. Each individual exchange unit is commanded by military officers while operational management is performed by employed civilians. (32 C.F.R. § 554.11 (1972)) (Brief of United States, at 3A)

The Exchange services are a major aspect of the Department of Defense operations. For the fiscal year 1971, the four military Exchange Services constituted the nation's second or third largest department store chain with annual sales of over $3,546,000,000.[11] As of

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hereunder at a rate of compensation exceeding $1,800 per annum." Act of July 9, 1918, ch. 143, 40 Stat. 845, 862.

However, in 1956, Congress enacted legislation prohibiting money appropriated for support of the Army and Air Force to be spent for Post Exchanges, although use of public buildings and public transportation was not prohibited. Act of Aug. 10, 1956, c.1041, 70A Stat. 270, 591, 10 U.S.C. §§ 4779(c), 9779(c).

[10] H.A.S.C. Rep. No. 91-77, at 12351.

[11] H.A.S.C. No. 92-75, Report by House Special Subcommittee on Nonappropriated Fund Activities Within the Department of Defense, of the Committee on Armed Services, 92d Cong., 2d Sess.

the present, they employ in excess of 100,000 civilian employees.[12] (Brief of the United States, footnote 2 at 3)

Congress exercises monitoring control over the Exchange operations. Thus, in 1949, 1953, 1957, 1970, 1972, the House Armed Services Committee reviewed operations and submitted to Congress findings and recommendations which were heeded by the military.[13]

C. Précis of Judicial Decisions Involving Nonappropriated Fund Activities

Judicial decisions touching on Exchange Services and other nonappropriated fund activities can be

(1972), at 16619. (Report hereafter sometimes referred to as H.A.S.C. Rep. No. 92-75.)

[12] The gross for the four military exchange services of $3,546,000,000 and employment of over 100,000 makes interesting contrast with executive departments of the government. For example, the non-military or civil budget of the Department of Defense for fiscal 1974 was $1,779,195,000, just one-half of that gross. The 1974 budget (actual) for State ($813,504,000), Justice ($1,920,804,000), Interior ($1,960,691,000) and Commerce ($1,501,432,000) were all far less.

And the totals of employees for fiscal 1974 for most executive departments were far less: State (22,644), Justice (48,188), Agriculture (79,621), Labor (12,788), Commerce (28,549), H.U.D. (15,021). The Treasury was about the same (104,391). Only Departments of Defense and Health, Education and Welfare (126,692) had more employees.

Statistics from United States Budget for fiscal 1975.

[13] H.A.S.C. Rep. No. 91-77, at 12349-50. The 1972 report reiterated this oversight function:

> As evidenced by the magnitude of this awesome entity within the Department of Defense, affecting military personnel and civilians at all levels, it is absolutely essential that the Congress of the United States maintain a continued monitoring of these vital and necessary activities. [H.A.S.C. Rep. No. 92-75, at 16616.]

grouped into four categories: (i) the leading decision by this Court, which held Exchange Services are instrumentalities of the United States: (ii) the Court of Claims decisions relating to contract claims and status of nonappropriated fund activities; (iii) the United States Circuit Court decisions mainly interpreting the Federal Tort Claims Act; and (iv) some miscellaneous other cases. There are apparently few if any state cases because a suit against a nonappropriated fund activity would involve an instrumentality and officers of the United States and be subject to removal to a federal court under 28 U.S.C. §§ 1442, 1442a.

(i) The governing case and the only one by this court directed to the status of Exchange Services is *Standard Oil Co. of California* v. *Johnson,* 316 U.S. 481, 86 L.Ed. 1611 (1942).[14] At issue was the applicability of a state gasoline tax to sales made to an Army post exchange. The Court noted that post exchanges operate under executive regulations which have the effect of law, that Congress has repeatedly recognized the activities of post exchanges are governmental and has made substantial appropriations for them, and that management and control is by government officials.

[14] *Paul* v. *United States,* 371 U.S. 245, 9 L.Ed. 2d 292 (1963), in part involved nonappropriated fund activities but the issues are not pertinent here. It was held that minimum wholesale price regulations for milk issued by State of California were in conflict with federal procurement policies and, therefore, not applicable to military purchases paid for out of appropriated funds. However, in respect to milk purchases for use in military clubs and post exchanges, which were paid for out of nonappropriated funds, it appeared to the court there was no conflicting federal procurement policy and, therefore, the case was remanded to ascertain whether the nonappropriated fund purchases were made within a federal enclave over which the United States had exclusive legislative control, in which event the state regulation could not prevail.

The Court also noted that the "government assumes none of the financial obligations of the exchange," a passing comment that influenced subsequent Court of Claims cases.

The Court held that the post exchanges are arms of the government deemed by it essential for performance of governmental functions, are integral parts of the War Department, and partake of whatever immunities that department may have under the Constitution and federal statutes, and are not subject to state taxation.

(ii) The Court of Claims has issued some fourteen decisions which in varying degrees relate to nonappropriated fund activities. The essence of these cases is stated, in chronological order, in the footnote below.[15]

[15] In *Dugan* v. *United States*, 34 Ct. Cl. 458 (1899), the first Court of Claims case on non-appropriated funds, it was held that the funds were established by regulation for governmental purposes, were, therefore, governmental enterprises, and as such were immune from Federal taxation. The next was *Williams* v. *United States*, 44 Ct. Cl. 175 (1909), which held that a Navy officers' mess on shore, not a Post Exchange, was only a private association rather than an instrumentality of the United States. In *Kyle* v. *United States*, 46 Ct. Cl. 197 (1911), not involving a Post Exchange, an enlisted man sought to recover the $10 per month he paid into the "post or company fund" for the privilege of serving as post barber, but it was held the United States was neither party to nor privy with the transaction and was, therefore, not liable. In *Woog* v. *United States*, 48 Ct. Cl. 80 (1913), it was held the paymaster could withhold from pay the amount of the funds an officer embezzled from the Post Exchange on Guam because the Post Exchange was a government institution, under control and regulations of the military, and the embezzled funds had been held in trust by the defalcating officer. In *Kenny* v. *United States*, 62 Ct. Cl. 328 (1926), the Court reached a contrary holding, namely that Post Exchange obligations were not obligations of the United States and, therefore, the United States could not withhold an officer's pay to meet his obligations to the Exchange, there being no debt due the United States. In *Sullivan* v. *United States*, 92 Ct. Cl. 154 (1940), interpreting the dual compensation act, it was held a retired officer was receiving dual compensation from the United States while serving as laundry manager at the Naval Academy because the laundry was built and equipped by the United States and supported in part by appropriated funds, and this was so even though he was paid from nonappropriated funds.

Borden v. *United States*, 126 Ct. Cl. 902 (1953), and *Pulaski Cab Co.* v. *United States*, 141 Ct. Cl. 160 (1958), employment and contract cases, are major decisions and are discussed in the text. *Cockrill* v. *United States*, 155 Ct. Cl. 181 (1961), involved the Dual Compensation Act and the employee of a golf club; the court was unable to ascertain whether plaintiff's employment was "under the United States Government" as no information was submitted by either party as to the nature of the club. In *Gradall* v. *United States*, 161 Ct. Cl. 714 (1963), it was held that an Exchange employee was not a Federal civilian employee for the purposes of salary limitations of the Dual Compensation Act. In *Brummitt* v. *United States*, 165 Ct. Cl. 78 (1964), the Court did not reach the issue whether a nonappropriated fund activity was within the meaning of "agency" for purposes of an I.R.S. code provision because the plaintiff's employer was merely a club and not such an activity.

In *G. L. Christian and Associates* v. *United States*, 160 Ct. Cl. 1 (1963), not a nonappropriated fund case, the court held the Capehart Housing Act involved the use of appropriated funds and, therefore, was within jurisdiction. In so holding the Court referred to the situation of nonappropriated fund contracts and stated that such contracts, "although made by Government officers, do not bind appropriated funds, do not create a debt of the United States, and may not be vindicated in this court." The Court cited *Borden* and *Pulaski*. This was dictum, only epitomizing prior holdings.

Keetz v. *United States*, 168 Ct. Cl. 205 (1964), and *Kyer* v. *United States*, 177 Ct. Cl. 747 (1966), employment and contract cases, are major cases and are discussed in the text.

Four of them are most pertinent because they involved employment and/or other contracts with post exchanges, were decided after, and under guidance of, this court's decision in the *Standard Oil Company* case, *supra,* and were the four examples stated by Congress as its reasons for enacting Public Law 91-350:

Borden v. *United States,* 126 Ct. Cl. 902 (1953)

Pulaski Cab Co. v. *United States,* 141 Ct. Cl. 160 (1958)

Keetz v. *United States,* 168 Ct. Cl. 205 (1964)

Kyer v. *United States,* 177 Ct. Cl. 747 (1966)

In *Borden* v. *United States,* 126 Ct. Cl. 902 (1953), the court's primary case on the issue, claimant was, as respondent here, an European Exchange Service employee. He had a contract of employment and sued to recover the salary withheld to set-off payroll funds lost allegedly through his negligence. The Court held that although plaintiff was entitled to recover, it lacked jurisdiction in view of the Supreme Court's "decision" that the Government assumes none of the financial obligations of the exchange.[16] Judge Whitaker, in his dissent, noted that the Supreme Court "decision" was actually an observation made "only incidentally, in the course of describing the operations of the exchange," and was not intended as a holding that the government was not liable on the obligations of the exchange. *Id* at 913. He concluded:

> Congress did not mean for this [result] to happen. It said so when it gave its consent to be sued on its contracts. [*Id.* at 914.]

The Court's next case involved a contract with a Post Exchange to provide taxi service at Fort Leonard Wood in return for ten percent of the gross receipts.

[16] The Court also based its decision on Army regulations providing that Exchange contracts are solely the obligations of the Exchange and not contracts of the United States. As pointed out in the dissent, the Army is not authorized to "say that their contracts are not government contracts," if such is not so. 126 Ct. Cl. 912.

Pulaski Cab Co. v. *United States,* 141 Ct. Cl. 160 (1958). The Court, following *Borden,* held that obligations of the Post Exchange were not obligations of the United States, and, therefore, the United States had not consented to be sued in respect to them. The Court noted that the contract provided it was "not a United States Government contract but is solely the obligation of the [Exchange]." *Id.* at 161.

The next of the four cases was *Keetz* v. *United States,* 168 Ct. Cl. 205 (1964). There plaintiff, as here, was an employee of the Army and Air Force Exchange Service in Europe. He sued to recover back pay for an alleged improper discharge contending, in view of *Borden,* that he was not basing his claim on a contract of employment but upon violation of Air Force regulations. *Id.* at 207. The Court made short shrift of this different approach holding that for an employee to recover for discharge in violation of Air Force regulations, he must be an employee of the United States. It then held, on the basis of two prior decisions,[17] that "an employee of the Exchange Service is not an employee of the United States." *Id.* at 207.

The last case was *Kyer* v. *United States,* 177 Ct. Cl. 747 (1966). There the plaintiff sued to recover brokerage commissions for service he rendered under a contract with the Grape Crush Administrative Committee, a group established pursuant to statutory authority given to the Secretary of Agriculture. The Court held it lacked jurisdiction because the Committee, although an instrumentality of the United States, was not supported by appropriations and did not have authority

[17] *Grodall* v. *United States, supra,* and *Brummitt* v. *United States, supra,* footnote 15.

to obligate appropriated funds for the purpose of the contract.

In *Kyer,* the Court buttressed its *Borden* reasoning by relying for the first time on a statute:

> While the terms of the [Tucker Act] are broad, its words must be read in conjunction with and must be regarded as limited by another statute which provides that our judgments are paid only from appropriated funds. [177 Ct. Cl. at 751]

The statute cited by the Court, 28 U.S.C. § 2517, states:

> (a) Every final judgment rendered by the Court of Claims against the United States shall be paid out of any general appropriation therefor, on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court.

A review of the history of 28 U.S.C. §2517 suggest its purpose was not substantive but bookkeeping and the court's statutory reliance questionable.[18]

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[18] The Act of February 18, 1904, c. 160, 33 Stat. 15, provided in respect to final judgments of all Federal courts that "payment thereof under appropriations made by Congress shall be made on settlements by the auditor for the department or branch of the public service having jurisdiction over the subject matter out of which the claim arose." Then the Act of March 3, 1911, c. 231, 33 Stat. 1087, at § 178, provided that the payment of a Court of Claims judgment shall be full discharge of all claims involved in the controversy.

The final predecessor act was the Act of June 10, 1921, c. 18, 42 Stat. 20. Its stated purpose was to provide a budget system and an independent audit of Government accounts, and for other purposes. Section 236 provided that all claims and demands by or against the Government "shall be settled and adjusted in the General Accounting Office."

The purpose of 28 U.S.C. § 2517 was, as set forth in its preamble, to codify existing law. 62 Stat. 979. It appears, therefore, from the language of the statute and its history that Congress did not intend to restrict or modify the jurisdictional statute but simply prescribed the accounting procedure for the satisfaction of judgments against the United States, whatever their origin.

The court has subsequently withdrawn from the cited statutory reliance, it appears, in view of its major decision in *Eastport Corp.* v. *United States,* 178 Ct. Cl. 599 (1967). That case did not involve nonappropriated fund activities but was an analysis of the ambit of the court's jurisdictional statute.[19] The statute authorizes suits against the United States on claims "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491, *supra.* It is literally broad enough to be interpreted as a complete Congressional waiver of all non-tort money claims. But the Court of Claims has not so interpreted it and explains in *Eastport* that it has circumscribed its jurisdiction to claims where there exists constitutional or statutory authority mandating Federal compensation expressly or by implication. Although there has been no need for the Court to do so since *Eastport,* the prior holdings in *Borden, Pulaski, Keetz,* and *Kyer,* could be rationalized by *Eastport* on the theory the nature of nonappropriated funds activities establishes absence

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[19] In *Eastport,* a statute authorized the Maritime Commission to regulate sale of American-acquired (as reparations), former German vessels to a foreign purchaser but did not suggest the United States would compensate a party suffering loss as a result of improper execution of such statute. The Court held that it lacked jurisdiction over plaintiff's claim for damage by the Maritime Commission's wrongful non-approval of plaintiff's contract to sell one such vessel to a Danish buyer in view of the lack of express or implied compensation authority.

of mandate to satisfy claims arising therefrom out of appropriated funds.[20]

(iii) In respect to the Federal Tort Claims Act, it is now fully established that the waiver of tort immunity extends to Exchange Services, and their employees are within the Act's reference to negligent conduct "of any employee of the Government." [21] 28 U.S.C. § 1346(b). An employee is defined, in part, as the employee of "any federal agency." 28 U.S.C. § 2671. It is noteworthy that the Government resisted these developments and contended that an Exchange Service was not a "federal agency" and an employee thereof was not an "employee of the Government." *E.g., Daniels* v. *Chanute Air Force Base Exchange,* 127 F.Supp. 920 (E.D. Ill. 1955). Indeed, it stipulated in a later case, despite losing in *Daniels,* that the plaintiff-employee "was not a Government employee. . ." *Aubrey* v. *United States,* 254 F.2d 768, 770 (D.C. Cir. 1958).

(iv) There are various other reported decisions involving in some degree nonappropriated fund activities but most add nothing to the cases already referenced.[22]

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[20] Respondent does not agree with this theory. The theory appears a rather makeshift one to codify various troublesome decisions. The Tucker Act is clear-cut and all-encompassing and should be taken literally for what was intended, a waiver of the anachronistic sovereign immunity concept, except where Congress has explicitly in separate legislation delimited the waiver in specific instances, as pointed out hereafter.

[21] *United States* v. *Holcombe,* 227 F.2d 143 (4th Cir. 1960); Letter dated July 13, 1960, from George C. Doub, Assistant Attorney General, 243 AF JAG Reporter 15 (August 1, 1960).

[22] Many do not involve the Exchange Service. In *Bluer* v. *United States,* 117 F.Supp. 509 (E.D. So.C. 1950), a suit on a contract of employment, jurisdiction was rejected because Congress expressly prohibited officers' messes from paying civilian employees out of

There are some exceptions. In *United States* v. *Howell,* 318 F.2d 162 (9th Cir. 1963), the United States was held to be the proper party to bring an action on behalf of the Exchange Services in a suit brought by the United States to recover from the Exchange's concessionaires sums obtained by fraud. The United States has successfully prosecuted under criminal statutes for the filing of false statements with the Exchange Service. *Brethauer* v. *United States,* 333 F. 2d 302 (8th Cir. 1964). The felony charged was the uttering of a false statement, under 18 U.S.C. § 1001, "in any manner within the jurisdiction of any department or agency of the United States." The Court held that "it is compellingly clear that a Post Exchange, although created by regulations, is an arm of the Government

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appropriated funds. In *Edelstein* v. *So. Post Officers Club,* 118 F.Supp. 40 (E.D. Va. 1951), the district judge, in a one-page memorandum decision, and relying on Army regulations, held the United States was immune from suit for obligations of an officers' club. In *Bailey* v. *United States,* 201 F.Supp. 604 (D. Alaska 1962), the district court dismissed a nonappropriated fund contract case on the authority of *Borden, supra.*

In *American Commercial Co.* v. *U.S. Officers, et al.,* 187 F.2d 91 (D.C. Cir. 1951), in which the United States was not a party, it was held the defendant European officers' club did not operate in the District of Columbia and, therefore, there was no jurisdiction over it in respect to plaintiff's contract claim. In *Nimro* v. *Davis,* 204 F.2d 734 (D.C. Cir. 1953), plaintiff's contract suit against the Naval Gun Factory Lunch Room was held to be, in effect, a suit against the United States and, therefore, under the Tucker Act, the district court did not have jurisdiction.

One recent decision applies the 1970 Tucker Act amendment but is inapposite here. *Swift-Train Co.* v. *United States,* 443 F.2d 1140 (5th Cir. 1971). There plaintiff-supplier claimed as third party beneficiary on a contract between a contractor and The Guest House Fund at Fort Sam Houston, Texas. The Court held Congress deliberately excluded from the amendment's right to sue those nonappropriated fund activities, such as the Guest House, which were not among the Exchange Services listed in the amendment.

and an agency of the United States within the meaning of 18 U.S.C. §1001." *Id.* at 305.[23]

It is noteworthy also that whenever the Exchange Services have been sued in foreign courts, the United States has prevailed in its contention that the Exchange Services are arms of the government and are, therefore, subject to suit only in courts of the United States. *See, e.g., Wuliger* v. *Headquarters, 7408th Supply Group (Special Activities),* Labor Court, Weisbaden, October 8, 1958, unreported, as cited in Senate Report No. 268, 91st Cong., 1st Sess. (1969), at page 2.

D. Legislative History

Public Law 91-350, the 1970 amendment to the Tucker Act, refers only to "express or implied contract":

> For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, . . . shall be considered an express or implied contract with the United States. [July 23, 1970, Pub. L. 91-350, § 1(b), 84 Stat. 449.]

A review of the legislative history discloses no explicit reference to employees of the Exchange Services. The proposed beneficiaries of the legislation are referred to

[23] Previously, in *Keane* v. *United States,* 272 F. 577 (4th Cir. 1921), it had been held that conspiracy to defraud a post exchange was not a conspiracy to defraud the United States. That decision was before the development of Post Exchanges to their present stature and, especially, before the Supreme Court's *Standard Oil* decision holding the Exchange Services to be instrumentalities of the United States. So it is doubtful that *Keane* has any present significance.

as contractors. But the history shows employee suits were the vertex of Congressional purpose. Hearings on S.3163 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 90th Cong. 2d Sess. (1968); Hearings on S.980 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. (1969); Hearings on S.980 Before Subcommittee No. 4 of the House Committee on the Judiciary, 91st Cong., 1st Sess. (1969); Senate Report No. 268, 91st Cong., 1st Sess. (1969) (Libr. Cong. 1-2:12834-2); House Report No. 91-933, 91st Cong., 2d Sess. (1970); 2 U.S. Code Cong. & Admin. News 1970.

The source of the 1970 amendment was S.980, which was introduced by Senator Tydings on February 7, 1969, with the following remarks, epitomizing what was to be the subsequent legislative history:

> Mr. President, nonappropriated fund activities are at present an anomaly of the law. When states have attempted to tax or regulate nonappropriated fund activities, these organizations have successfully argued that they are immune from taxation and regulation as instrumentalities of the United States. When sued in foreign courts, nonappropriated fund activities have successfully argued that as instrumentalities of the United States they are not liable to contract suit, except in the courts of the United States. Our own courts have held, and the Justice Department has concurred in such holdings, that employees of nonappropriated fund activities, engaged in the performance of their duties, are employees of the United States, so that the United States is liable, under the Federal Tort Claims Act, for their negligence within the scope of their employment. The

United States has, in fact, sued in its own name to enforce contracts entered into by nonappropriated fund activities.

Yet, today, although nonappropriated fund activities are continually identified with their parent department or agency of the United States, contractors with such activities have found the courtroom door barred when they allege a breach of a contract by such an activity. State courts have disclaimed jurisdiction to entertain the claims, holding that the federal courts are the appropriate forum. Both the federal district courts and the U.S. Court of Claims afford no relief because of the alleged loophole in the Tucker Act. Repeatedly, these courts have held that the Tucker Act's waiver of the sovereign immunity of the United States to contract suits is not broad enough to permit the Court of Claims or the U.S. District Court to entertain suits against nonappropriated fund activities.

I fully agree with a judge of the Court of Claims, who, in reluctantly dismissing a suit by a contractor against a nonappropriated fund activity because of the lack of appropriate jurisdiction, stated, "this is a matter which sorely needs congressional correction."

I introduced a similar measure in the 90th Congress, Mr. President, and the Subcommittee on Improvements in Judicial Machinery took 2 days of testimony on the bill . . .

All of the witnesses agreed that there was no rational policy grounds that would justify the continuation of the anachronistic immunity from suits of nonappropriated fund activities, when Congress has already waived such protection from suits on contracts of the U.S. Government itself, and the courts have held the nonappropriated fund activities to be instrumentalities of the United States

for purposes other than suit. This legislation was endorsed in principle by the House of Delegates of the American Bar Association's annual meeting in Philadelphia last August. [115 Cong. Rec., Part 3, p. 3162 (1969), 91st Cong., 1st Sess.]

Hearings on S.980 were held on March 4, 1969. *Hearings on S.980 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 91st Cong., 1st Sess. (1969). Senator Tydings opened the hearings with the comment that there was information before the Subcommittee that "the present immunity from contract suit afforded nonappropriated fund activities was an anomaly of the law which needed to be changed." *Id.* at 1. Senator Hruska's statement was, in part, as follows:

> The purpose of this bill is to fill this loophole. It provides the damaged party a forum for suit.
>
> Seldom do we find a bill whose purpose receives such unanimity of support. No rational reason now exists why a person should not be provided a judicial forum to present his claim against a nonappropriated fund activity. [*Id.* at 6.]

The predecessor bill referred to by Senator Tydings as quoted above, was S. 3163, for which there were held two days of hearings on May 8 and 21, 1968. *Hearings on S. 3163 Before The Subcommittee On Improvements In Judicial Machinery of the Senate Committee on the Judiciary,* 90th Cong., 2d Sess. (1968) Congressman Machen, a member of the House Committee on the Armed Services, testified in support of the bill because, he stated, it is

> . . . a necessary measure to correct a jurisdictional gap in the Tucker Act. . . . This gap has de-

veloped because the Court of Claims has held that it does not have jurisdiction over suits against a nonappropriated fund, and this lack of jurisdiction has resulted in an inequity which denies to an individual his day in court. [*Id.* at 84.]

Chief Judge Cowen of the Court of Claims supported S. 3163 as follows:

> . . . I believe not a single witness . . . will take the position that there is any just or logical reason for the immunity of these instrumentalities of the government, when the government itself has been suable on the same grounds for about 100 years.
>
> As you know, in the several cases involving nonappropriated fund activities which the Court of Claims has been compelled to dismiss because of lack of jurisdiction the Court in each case pointed out the need for legislation to bridge this curious, this anomalous, this unwarranted gap in the law.[24]
>
> So, I can sum up very quickly, Mr. Chairman, by saying that the judges of the Court of Claims are unanimously in favor of this legislation, and

[24] In *Borden, supra*, a 1953 pay case, the Court stated:

> We think it is proper that this situation should be called to the attention of Congress. [126 Ct. Cl. 909]

In *Keetz, supra*, a 1964 pay case, the Court stated:

> . . ., we believe that in these situations (especially where the waiver of sovereign immunity is involved) it is up to Congress to remedy this apparent harsh result, and the courts should refrain from legislating by judicial fiat. [168 Ct. Cl. 207]

In *Kyer, supra*, a 1966 brokerage commission case, the Court stated:

> We are mindful of the fact that the result reached spells an unduly harsh outcome. Plaintiff has searched in vain for a forum in which the merits of his claim might be aired. We add, though perhaps of little comfort, that the lack of jurisdiction which plaintiff has faced at every turn is a matter which sorely needs Congressional correction. [177 Ct. Cl. 754]

> that we have no suggestions for any changes or amendments. [*Id.* at 193-194]

The Senate Judiciary Committee reported favorably on S.980. S. Rep. No. 268, 91st Cong., 1st Sess. (1969) (Libr. Cong. 1-2: 12834-2) The report at page 2 explained the need and purpose for the legislation as follows:

> S. 980 will fill a gap in the Tucker Act's waiver of immunity of the United States to claims based upon contracts with departments or agencies of the Government. The United States is liable in the Court of Claims of the United States and, in appropriate cases, in the district courts of the United States, to suits "upon any express or implied contract with the United States***." 28 U.S.C. 1491; 28 U.S.C. 1346(a)(2). The courts have repeatedly held, however, that the Federal Government's liability to suit under these sections only exists with respect to contract obligations to be paid out of appropriated funds. See, e.g., *Kyer* v. *United States*, 369 F.2d 714 (Ct. Claims 1966); *Pulaski Cab Co.* v. *United States*, 157 F. Supp. 955 (Ct. Claims 1968); *Keetz* v. *United States*, 168 Ct. Claims 205 (1964); *Borden* v. *United States*, 116 F. Supp. 873 (Ct. Claims 1963).
>
> The injustice and inequity worked by this Tucker Act "loophole" have been recognized often. See, *e.g.*, *Borden* v. *United States*, 116 F. Supp. 873, 878-880 (Ct. Claims 1953). Indeed, a judge of the Court of Claims has declared "this is a matter which sorely needs congressional correction." See *Kyer* v. *United States*, 369 F.2d 714, 719 (Ct. Claims 1966).
>
> Nonappropriated fund activities are at present an anomaly of the law. When States have attempted to tax or regulate their activities these activities have successfully argued that they are

immune from taxation and regulation as instrumentalities of the United States. See e.g., *Park Davis* v. *G.E.M., Inc.*, 201 F. Supp. 207 (D. Md. 1962); *Falls City Brewing Co.* v. *Reeves*, 40 F. Supp. 35 (W.D.Ky. 1941). When nonappropriated fund activities have been sued outside the United States they have successfully argued that, as instrumentalities of the U.S. Government, they are not liable to suit on contract in foreign courts. See, e.g., *Wuliger* v. *Headquarters, 7480th Supply Group (Special Activities) Labor Court*, Weisbaden, October 8, 1958, unreported. Courts have held, see, e.g., *United States* v. *Holcombe*, 277 F.2d 143 (4th Cir. 1960); *Daniels* v. *Chanute Air Force Base Exchange*, 127 F. Supp. 920 (E.D. Ill. 1955), and the Justice Department has supported the ruling (letter dated July 13, 1960 from George Cochran Doub, Assistant Attorney General, 243 AF JAG Reporter, 15 (Aug. 1, 1960)), that employees of nonappropriated fund activities when performing their official duties, are employees of the United States and that the United States is liable under the Federal Tort Claims Act for injuries caused by their negligence. The United States has even sued in its own name to enforce contracts entered into by nonappropriated fund activities. See, e.g., *United States* v. *Howell*, 318 F.2d 162 (9th Cir. 1963).

The four cases cited in the report as illustrations of the "gap" are the four Court of Claims cases discussed in Statement C herein and all relate to claims for pay or personal services as distinguished from claims of supply or construction contractors. Two *(Borden* and *Keetz)* were employee discharge cases, one *(Kyer)* was a claim for brokerage commissions, and only one *(Pulaski)* involved a commercial type contract and even that was for services.

S. 980 passed the Senate without debate on June 30, 1969. 115 Cong. Rec., Part 13, p. 17697, 91st Cong., 1st Sess. The amendments added by the House were accepted without debate on July 14, 1970. 116 Cong. Rec., Part 18, p. 24186, 91st Cong., 2d Sess.

On the House side, hearings were held on S. 980 on September 24, 1969. *Hearings On S.980 Before Subcommittee No. 4 of the House Committee On The Judiciary*, 91st Cong., 1st Sess., Ser. 4 (1969), Commissioner Louis Spector of the Court of Claims appeared on behalf of the American Bar Association and advised the Subcommittee that the Association's House of Delegates and Section of Public Contract Law had endorsed the proposed legislation in principle. He stated, in part, as follows:

> [Nonappropriated fund activities] are immune from State and local taxation as an arm of the U.S. Government. They are sueable under the Federal Court of Claims Act [sic] on the ground that their torts are committed by Federal employees. In connection with their contracts overseas, they enjoy immunity from suit as an instrumentality of the United States. In this country, when they have a contract with another party, they are perfectly at liberty to sue that other party.
>
> There is just this little remnant where they are in turn immune from suit by the other party to the contract. As I say, simple equity and justice would dictate that this immunity be removed.
>
> It was over 100 years ago that President Lincoln, in sending his message to Congress to set up the U.S. Court of Claims, said: "It is as much the duty of the Government to render prompt justice against itself, in favor of its citizens, as it is to administer the same between private individuals." [*Id.* at 5.]

The House Judiciary Committee also reported favorabl on S. 980. H.R. Rep. No. 91-933, 91st Cong., 2d Sess. (1970), 2 U.S. Code Cong. & Admin. News 1970. The purpose of the bill was described in the same language used in the Senate report except for the use of "loophole" in lieu of "gap" in the opening line:

> S. 980 will remove a loophole from the Tucker Act, which provides for the waiving of the sovereign immunity of the United States with respect to contract claims. Under the Tucker Act, the United States is liable in the Court of Claims of the United States and, in appropriate cases, in the district courts of the United States, to suits "upon any express or implied contract with the United States***" 28 U.S.C. 1491; 28 U.S.C. 1346(a)(2). The courts have repeatedly held, however, that the Federal Government's liability to suit under these sections only exists with respect to contract obligations to be paid out of appropriated funds. See, e.g. *Kyer* v. *United States*, 369 F.2d 714 (Ct. Claims 1966); *Pulaski Cab Co.* v. *United States*, 157 F. Supp. 955 (Ct. Claims 1968); *Keetz* v. *United States*, 168 Ct. Claims 205 (1964); *Borden* v. *United States*, 116 F. Supp. 873 (Ct. Claims 1953).
>
> The injustice and inequity worked by this Tucker Act "loophole" have been recognized often. See, e.g., *Borden* v. *United States*, 116 F. Supp. 873, 878-880 (Ct. Claims 1953). Indeed, a judge of the Court of Claims has declared "this is a matter which sorely needs congressional correction." See *Kyer* v. *United States*, 369 F.2d 714, 719 (Ct. Claims 1966). [*Id.* at 2.]

The four Court of Claims decisions cited in the above passage and in the Senate Report are the four cases which illustrated for the Committees the "loophole" or "gap" to be closed.

The House report expressed concern with the application in S. 980 to every "nonappropriated fund activity" because data concerning all such activities were not then available and "Congress ought not to expose the Federal Government to liability for *all* nonappropriated fund activities until such data is assembled." *Id.* at 3. It recommended that activities to be covered be specified as follows: Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration. *Id.* at 3. This was done, accepted by the Senate and is reflected in the legislation as passed.[25]

S. 980, as amended, passed the House on April 7, 1970. The debate brought out its purpose as being the waiver of immunity in respect to contract claims against the Exchange Services. 116 Cong. Rec., Part 8, pp. 10604-10606 (1970):

> The SPEAKER. The gentleman from Colorado (Mr. Rogers) is recognized.
>
> Mr. ROGERS of Colorado. Mr. Speaker, I urge the House to give favorable consideration to S. 980, as amended by the Committee on the Judiciary.
>
> The enactment of this measure will remove a number of inequities that have arisen as the result of a loophole in the Tucker Act.
>
> Under the Tucker Act, the United States has waived its sovereign immunity with respect to contract claims. However, the construction given to the Tucker Act by the courts has left a loophole,

[25] The House Subcommittee was concerned with the many small and oftentimes transitory "nonappropriated fund activities" such as "auto, wood, and camera hobby shops, and the like." Hearings on S.980 Before House Subcommittee No. 4, *supra*, at p. 13.

which creates inequities for some claimants. This loophole exists with respect to contracts entered into by those Federal instrumentalities which operate as nonappropriated fund activities. In short, under present construction of the Tucker Act, a plaintiff with a legitimate claim against a nonappropriated fund activity is not entitled to any judicial relief. S. 980 as reported by the Committee on the Judiciary is intended to close this loophole with respect to contracts entered into by post exchange types of operations conducted within the Department of Defense and the National Aeronautics and Space Administration. [*Id.* at 10604.]

* * * * *

Mr. ROGERS of Colorado. The reason for it is that we do not think that the exchanges which do the major portion of all this business should be immune from suit. They should at least be required to come into court and be responsible like any other function or business concern with respect to the contracts that they enter into. [*Id.* at 10605.]

* * * * *

Mr. FISH. Mr. Speaker, I rise in support of S. 980. This bill, as amended by the Judiciary Committee, should command widespread, if not unanimous support because, first, it helps correct a gross inequity in the law, second, there is no known opposition to the bill, and, third, it will not cost the taxpayers a single penny.

* * * * *

The Tucker Act, enacted in 1887, removes the protection of sovereign immunity from the United States for suits in contract. Although nonappropriated fund activities have been held to be instrumentalities of the United States and thus protected by sovereign immunity from suits in contract, the courts have held that they do not come within the ambit of the Tucker Act since the contract obligations are not paid out of appropriated funds.

S. 980, as it passed the other body, would close this loophole in the Tucker Act by permitting the aggrieved party to sue the U.S. Government where the gravamen of the complaint arises from a contract with a nonappropriated fund activity. Such activity would then have to reimburse the United States for any judgment paid. [*Id.* at 10605-06.]

The legislative history reflects Congressional concern with a "gap" or "loophole" whereby Exchange Services escaped jurisdiction. And that "gap" or "loophole" was the one made by the four cases cited: *Borden, Pulaski, Keetz* and *Kyer, supra.* Indeed, there are no others really at point in the Court of Claims, and none in other courts except the three district court cases: *Bluer, Edelstein* and *Bailey, supra.*

Correction of the "harsh result" (*Keetz,* 168 Ct. Cl. 207) imposed by *Keetz* and *Borden* was the intent. That intent to insure a day in court for employees and similar claimants illustrated by the four cases is indicated by language used in the Senate report in the following passage (relating, however, to the advisability of trying to define the meaning of "nonappropriated fund activity"):

> . . . any attempt to limit the courts in their determination of [what is a nonappropriated fund activity] would ultimately serve to create additional loopholes through which clever defendants may ultimately retreat into *the anchronism of government immunity that the bill seeks to eradicate.* [Senate Report No. 268, *supra,* at 6 (emphasis supplied)]

S. 980 became Public Law 91-350 on July 23, 1970 (84 Stat. 449).

ARGUMENT

Summary

Exchange Service employees have heretofore been considered by the courts and the government as contract employees not within coverage of most Civil Service laws, rather than "federal" employees, and this contract relationship is not precluded by certain federal elements which attach to their employment. This being so, such employees are entitled to sue the United States under the 1970 amendment to the Tucker Act relating to express or implied contracts. However, irrespective of such contract basis for suit, the Exchange Service employees are governed by executive regulations and have a Fifth Amendment interest in their employment positions, and their rights arising therefrom are enforceable under the other, non-contract provisions of the Tucker Act. Furthermore, Congress has never barred Exchange employees from suing the United States and the clear intent of the 1970 amendment was to remove any vestige of sovereign immunity of the United States in respect to obligations of the Exchange Services, whether the obligations arise from contract or otherwise. Accordingly, the denial by the Court of Claims of petitioner's motion to dismiss for lack of jurisdiction should be affirmed because jurisdiction over the claim does exist under the Tucker Act on various grounds.

I

RESPONDENT WAS AN EXCHANGE SERVICE CONTRACT EMPLOYEE ENTITLED UNDER THE 1970 TUCKER ACT AMENDMENT TO SUE IN THE COURT OF CLAIMS FOR BREACH OF EMPLOYMENT CONTRACT AND THE COURT OF CLAIMS HOLDING TO THIS EFFECT SHOULD BE UPHELD.

The Tucker Act confers jurisdiction upon the Court of Claims over "any claim against the United States founded . . . upon any express or implied contract with the United States," and the 1970 Amendment mandated that contracts with the Exchange Services are contracts with the United States. 28 U.S.C. §1491, as amended by Pub. L. 91-350, 84 Stat. 449.

The jurisdictional issue and this appeal is summarily resolved if respondent's employment relationship with the Exchange Service was contractual. Petitioner appears to concede this. Thus, after quoting the 1970 amendment, petitioner states that "the pivotal issue in the present case is whether an employee of a military exchange has an express or implied employment contract . . .," and then concludes such employees "do not have a contractual relationship with the government."[26] (Brief of the United States at 14)

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[26] The dissent below goes a bit further than the government has done yet, contending that inasmuch as legislative history of the amendment contains no explicit reference to pay cases and a reference would have been appropriate if Congress intended to extend a remedy to many thousands of employees, Congress must have intended to waive immunity only in respect to contract claims of independent third parties who contract in respect to supplies and services but not to contracts for employment services. The dissent follows, in respect to the contract question, the Fifth Circuit: *Young* v. *United States,* 498 F.2d 1211 (1974). This position is

It is fundamental that the relationship of employer and employee is a relation created by contract, either express or implied. *Fleming* v. *A. H. Belo Corp.*, 121 F.2d 207, 214 n.9 (5th Cir. 1941), *aff'd.* 316 U.S. 624 (1942), *reh. denied,* 317 U.S. 706 (1942); *Ward* v. *Atlantic Coast Line Railroad Co.,* 265 F.2d 75, 83 (5th Cir. 1959); *rev'd. on other grounds,* 362 U.S. 396 (1960); 53 *Am. Jur. 2d,* Master and Servant, §§ 14, 66 (1970).

The only exception to the principle is the special instance of public officials and these do not have enforceable contract or property rights to employment but are appointed to office. *Butler* v. *Pennsylvania,* 51 U.S. (10 How.) 402 (1850). As pointed out by the majority below, at footnote 5, the rationale for this "appointed" status is that the Government must have the power to change the agents who carry out the public duties, as well as the terms under which they work. *Id.* at 416-417. *See also Taylor* v. *Beckman,* 178 U.S. 548 (1900); *Crenshaw* v. *United States,* 134 U.S. 99 (1890); *United States* v. *Hartwell,* 73 U.S. (6 Wall.) 385 (1868); *Urbina* v. *United States,* 192 Ct. Cl. 875, 428 F.2d 1280 (1970).

The Court of Claims has long held that an Exchange Service employee is not a "federal" employee. *Keetz* v. *United States,* 168 Ct. Cl. 205 (1964). There, as here, the plaintiff had been improperly discharged from employment by the Air Force Exchange Service in Europe. The Court stated it would have to decide that plaintiff was "an employee of the United

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rebutted by the fact the "gap" or "loophole" Congress undertook to close was formed by four cases, two of which were employee pay cases (*Borden* and *Keetz*). See Statement C above, and the Court of Claims majority response in the decision below.

States before we can correct the alleged wrong," because of lack of jurisdiction over claims against the Exchange. 168 Ct. Cl. at 207. It then concluded:

> We have repeatedly held, admittedly in other contexts, that an employee of the Exchange Service is not an employee of the United States. [168 Ct. Cl. at 207.]

The government's position in *Keetz* was that plaintiff had a *contract* of employment. (Defendant's Motion to Dismiss, filed January 30, 1964) The plaintiff, in order to avoid *Borden,* stated his claim was not "predicated" upon a contract of employment (thus not denying there was one although the government assumed otherwise) but upon the arbitrary refusal of the Exchange to comply with regulations. The government insisted to the contrary:

> Such a contention is irrelevant to the jurisdictional problems, and, moreover, *it is patently not true that the claim here is not founded on contract.* [Defendant's Opposition to Plaintiff's Motion for Leave to Join a Third Party Defendant, etc., filed April 10, 1964, at page 2] [emphasis supplied]

In *Brummitt* v. *United States,* 165 Ct. Cl. 78 (1964), at 80, by way of *dictum,* the Court stated: "On the contrary, it is established that employees of nonappropriated fund activities are *not employees of the United States.*" (emphasis in original)

In *Gradall* v. *United States,* 161 Ct. Cl. 714 (1963), at 723, the Court held plaintiff's employment in the Army and Air Force Exchange Services "did not constitute holding a civilian office or position under the United States Government" within the restrictions

of the dual compensation statute which applied to "a civilian office or position, appointive or selective, under the United States Government." 161 Ct. Cl. at 716.

The Court of Claims has now in its decision in the pending case explicity reaffirmed its position that Exchange Service employees are not "federal" employees:

> However, defendant's reliance on the "appointed" rationale begs the fundamental question of whether employees of nonappropriated fund instrumentalities are, in fact, Federal employees. If exchange employees are not Federal employees, their status is not controlled by the "appointment" rationale. And, indeed, we have stated in *Keetz, supra*, and reaffirm here, that "an employee of the Exchange Service is not an employee of the United States." *Keetz, supra*, at 207.[6] *See also Gradall, supra; Brummitt v. United States*, 165 Ct. Cl. 78, 80, 329 F.2d 966, 967 (1964).
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[6] In fact, the Government in *Keetz* v. *United States*, 168 Ct. Cl. 205 (1964), argued that an AAFES employee had a contract of employment. We find it a bit ironic that in the instant case, the Government argues just the opposite. We can only assume that this inconsistency has occurred because the enactment of Pub.L. 91-350 now grants jurisdiction for exchange contract claims. We held the Government's contract theory in *Keetz* to be correct and see no reason to change in the instant case. [513 F.2d at 1364-65]

The Court of Claims has, in effect, in this line of cases, dichotomized employees into contractual employees of the Exchange Services and "federal" employees who are governed by the Civil Service Commission.[27] Thus, the court refers in its decision herein

[27] Congress has excluded Exchange Service employees from the Civil Service laws. Thus, 5 U.S.C. § 2105(c), in defining employee,

to the non-contract status of appointed public officers and states: "This 'appointment' status has been extended by law to include employees of the United States who are subject to the laws administered by the Civil Service Commission. *See* 5 U.S.C. §§ 2104, 2105, 3105 (1970)." (513 F.2d at 1364) In other words, the so-called appointment status employees being within the class of *Butler, Taylor, Crenshaw, et al.*, cannot have and do not have contract or property rights to employment. It follows that others outside that class are not so barred, and Congress has drawn the distinguishing lines by 5 U.S.C. § 2105.

The Court of Claims has not excluded Exchange Services employees from the status of federal in all regards, and, indeed, it could not inasmuch as Congress has included them under a number of federal employee statutes. E.g., Act of Aug. 19, 1972, § 1(a), 86 Stat. 564, 5 U.S.C. § 5342(a)(1) (1975 pocket part), equality of pay among government employees applies to Exchange employees except those in recognized crafts or trades.

The issue is not whether an Exchange Service employee is a federal employee but whether his employment status is contractual. The contractual and federal concepts are overlapping rather than mutually exclusive.[28] Those who are not in the *Butler, et al.*

provides an Exchange Service employee is not an employee for purpose of laws administered by the Civil Service Commission, with some exceptions. See Brief of United States at 1A for statute. See further discussion of statute in Argument II herein.

[28] The Court of Claims failed to develop this distinction as the Exchange Services were growing from mere instrumentalities to major instruments of government operations. Assuming validity to the pre-1970 lack of jurisdiction over Exchange contracts, the employees should have been granted their claims on the basis the

class are, necessarily, contractual, because it is only that class which lacks enforceable contract or property rights in employment.

The government's frequent view,[29] conflicting with its present position, in the Court of Claims over the years that Exchange Service employees do not have status as federal employees (but have a contractual relationship) was sometimes echoed in the other major line of cases related to the Exchange Services, those interpreting the Federal Tort Claims Act. (See Summary C (iii), above.) E.g., it contended unsuccessfully such an employee was not an "employee of the Government" under that act. *Daniels* v. *Chanute Air Force Base Exchange*, 127 F.Supp. 920 (E.D. Ill. 1955). In a subsequent case, it stipulated that the plaintiff employee "was not a Government employee. . ." *Aubrey* v. *United States*, 254 2d 768, 770 (D.C. Cir. 1958).

The Civil Service Commission has in the past considered Exchange employees to be contract employees. Subsequent to *Standard Oil Co. of California* v. *Johnson, supra*, there arose confusion whether employees

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claims arose under the other, non-contract elements of the Tucker Act. The Fifth Circuit, on which petitioner relies, essentially takes this position. *Young* v. *United States*, 498 F.2d 1211 (1974). See discussion below in Argument II.

[29] It is not contended that the government's prior position was necessarily a deliberate and consistent policy as, no doubt, it was in large part dictated by situational advocacy. E.g., obtaining interpretation of the Federal Tort Claims Act, defending against contrasting claimants' positions in *Borden* and *Keetz*. On the other hand, legislative history does not disclose that the Department of Justice advised Congress in the processing of S.980 that there existed a remaining "gap" or "loophole" in the Tucker Act through which the government would "ultimately retreat into the anachronism of government immunity that the bill seeks to eradicate." Senate Report No. 268, *supra*, at 6.

of Exchanges as "arms" of the government were subject to the requirements and entitled to the benefits of Civil Service. Legislation was proposed (enacted and now 5 U.S.C. § 2105(c)) and the Chairman of the Commission submitted its position to Congress by letter dated July 23, 1951, addressed to the Hon. Tom Murray:

> Based upon early decisions of the Court of Claims, and decisions of the accounting officers of the Government, the Commission determined that employees of post exchanges were not Government employees in the executive service but were employees of the exchanges *working under what amounted to a private contract of employment.* This ruling was followed prior to a decision of the Supreme Court of the United States concerning the status of Army post exchanges (*Standard Oil Company* v. *Johnson*, 316 U.S. 481, decided June 1, 1942). [H.R. No. 1995, 82d Cong., 2d Sess., 2 U.S. Code Cong. & Adm. News 1952, at 1523.] [emphasis supplied]

The 5 U.S.C. § 2105(c) exclusion of Exchange employees from Civil Service Commission laws was consistent with prior treatment by the Commission as being under "contract of employment" and was enacted to avoid change in their status after *Standard Oil Co. of California* v. *Johnson, supra.*

Petitioner's attempt here to categorize Exchange employees as federal and, therefore, not contractual relies on the Army and Air Force regulations (AR 60-21/AFR 147-15) [30] (See Appendix B of Brief of United

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[30] Judge Whitaker answered the contention that Exchange Service regulations can control the question of jurisdiction, in his dissent in *Borden* v. *United States, supra.* He referred to the then (1945) AR provision that exchange contracts are not government contracts and stated:

States.) Thus, petitioner refers to the regulation language, "authority to appoint," and to the explicit provisions for employment agreements for special functions and specific periods of time (perhaps, e.g., a consultant). It is obvious from the executive regulations applicable to Exchange Services that the military departments have substantially superimposed on the Exchanges the structure and procedures applicable to all federal employees, a practical management arrangement. But this arrangement and the use of the word "appoint" does not preclude contract status for employees. Petitioner cites no authority to the contrary.[31] The words "employ", "employees" and "employment" are also used consistently in the regulations.[32] These and comparable words are used interchangeably both in business and in government in reference to

> By what authority does the Army say that their contracts are not government contracts? Congress has not authorized it to do so. It authorized it to set up exchanges, but Congress did not authorize it to set aside a prior Act of Congress making the Government liable to suit on its contracts, express or implied. The quoted Army regulation is in derogation of the Act of Congress giving consent to suit on its contracts. It is, therefore, invalid. The Army cannot set aside an Act of Congress. [126 Ct. Cl. at 912]

[31] Unquestionably the Exchanges have general authority to contract and have always done so. Further, there are no statutes preventing the Exchanges from documenting all civilian employment by means of an elaborate form of "Contract of Employment" rather than "Personnel Action" notice or comparable form. It is noteworthy the Government did not contend the written contract in *Borden* was void or that the implied contract it contended existed in *Keetz* was void.

[32] The A/AF regulations provide for several employee pay plans including a commission plan whereby pay is "computed on the basis of an established percentage of sales volume," which is certainly more the flavor of contract than appointment. (See section 4-19b(3), at 8A, Brief of United States.)

wage earners, salaried persons and executives. The use of "appoint" can be form only and does not establish a legal relationship contrary to statute or that implied by law. *Burnap* v. *United States,* 252 U.S. 512, 64 L.Ed. 692 (1920) [33] In reality, the regulations upon which petitioner relies constitute the contract terms of employment between the Exchanges and their civilian employees.

Petitioner also contends that decisions holding Exchange employees are federal employees under the Federal Tort Claims Act establish they are non-contractual because other federal employees covered thereunder are non-contractual. (Brief of United States, at 22) The purpose of the Tort Claims Act was to waive tort immunity of the United States "under circumstances where the United States, if a private person, would be liable. . ." (28 U.S.C. §1346(b)) And such liability was extended to torts "of any employee of the Government" within the scope of his employment. (*Ibid.*) The statute did not seek to differentiate classes of federal employees and there is nothing in the Act which limits liability to acts of non-contractual employees. Rather, the word "employee", as used in the Act, "is to be read as having the same general meaning as the term 'servant' has in the body of law relating to the doctrine of respondent superior." *United States* v. *Becker,* 378 F.2d 319, 321 (9th Cir. 1967). Liability under respondent superior is determined not by a tech-

[33] Indeed, the record does not show the documentation reflecting the form of respondent's engagement. Respondent alleged below that his "employment arose by virtue of a contract of employment . . . and/or by virtue of appointment pursuant to regulations . . ." (Petition below, ¶4) To the extent that factual matters are involved, there is no evidence of record and no resolution of facts at the present stage of the litigation.

nical employment category but by such elements as power of control. 53 *Am. Jur.* 2d, Master and Servant, § 2.

Describing the employment relationship here as federal or non-federal is immaterial. The issue is whether the relationship was contractual. The theory that *every* federal employment status is incompatible to contract is untenable. There are no constitutional or statutory barriers whatever proscribing a contractual relationship for Exchange Services employees. The non-contract concept in respect to federal employment means only that ordinarily no enforceable contract or property rights vest in the employee. *Taylor* v. *Beckham,* 178 U.S. 548 (1900); *Crenshaw* v. *United States,* 134 U.S. 99 (1890). But, Congress can, of course, instruct the heads of departments as to conditions for the appointment of "inferior Officers" (U.S. Const. Art. II, § 2) as it deems best. *United States* v. *Perkins,* 116 U.S. 483, 29 L.Ed. 700 (1886). Congress could convert the so-called "appointed" relationship of all inferior federal officers to a full contractual relationship, and, indeed, has substantially done so and more by virtue of the numerous statutes governing federal employment.

Congress has recognized the contract status of Exchange Service employees as set forth in judicial decisions over the years. Thus, by its monitoring of Exchange Services, the frequent appropriations for them, and the approval of military regulations governing the Exchanges, it has approved the status. (Statement B, above.) And by excluding Exchange employees from the Civil Service Commission administered laws (after the *Standard Oil* case in 1942) and now by enacting the 1970 Tucker Act amendment to close the "gap" or

"loophole" caused by *Borden* and *Keetz,* it confirmed the contractual relationship of Exchange employees.

II

PETITIONER'S CONTENTIONS THAT EXCHANGE EMPLOYEES HAVE NO CONTRACT OR OTHER EMPLOYMENT RIGHTS ARE ANACHRONISTIC AND CONTRARY TO THE INTENT OF CONGRESS AND PRIOR PRECEPTS OF THIS COURT

Petitioner opens its argument (Summary at p. 5) by stating the issue is whether "the United States has waived sovereign immunity to suit by a former employee of the United States Exchange Service." Actually, sovereign immunity is not really involved as Congress has long since waived by the Tucker Act all immunity in respect to claims *against the United States* founded upon the Constitution, any act of Congress, any executive regulation, any express or implied contract, or for liquidated or unliquidated damages not sounding in tort. Respondent's claim here for improper employment discharge necessarily must relate to either Constitutional or statutory or regulatory and/or contract rights, and to non-tort damages. The question is not waiver but whether the claim for invasion of respondent's rights is one against the United States, i.e., one for which the United States is responsible and liable, whether it arises from contract or otherwise.

Petitioner pursues its sovereign immunity argument with five contentions: (a) the Tucker Act is procedural and the source for money damages must be founded elsewhere; (b) Congress has denied Exchange employees all right to sue by excluding them from the Lloyd-LaFollette Act and Back Pay Act; (c) there is no statute, regulation, or other substantive basis for enforcing claims of the employees against the United

States; (d) the lack of explicit reference in the legislative history of the 1970 amendment to employee pay claims establishes Congress did not intend to grant such right; and (e) the pre-1970 prohibition of employee suits must remain in effect. These have been partially answered above and now will be answered further *seriatim*.

Each of the contentions violates injunctions by this court respecting interpretation of the Tucker Act:

> It is "an inadmissible premise that the great act of justice embodied in the jurisdiction of the court of claims is to be construed strictly and read with an adverse eye." *United States* v. *Emery, Bird, Thayer R. Co.*, 237 U.S. 28, 32, 59 L.Ed. 825, 827 (1915) (Holmes, J.)
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> Congressional actions removing government immunity "should be given hospital scope." *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U.S. 381, 391, 83 L.Ed. 784, 790 (1939) (Frankfurter, J.)

Further, if successful, petitioner's contentions would achieve what Congress sought to prevent by the 1970 Tucker Act Amendment:

> . . . additional loopholes through which clever defendants may ultimately retreat into the anachronism of government immunity that the bill seeks to eradicate. [Senate Report No. 268, *supra*, at 6.]

(a) Tucker Act provides substantive right to suit

In respect to petitioner's contention that the Tucker Act alone provides no independent, substantive right to sue, it has been held this "wrongly equates the issue of jurisdiction with the merits." *Ralston Steel Corp.* v. *United States*, 169 Ct. Cl. 119, 124 (1965), *cert. den.*

381 U.S. 950, 14 L.Ed. 2d 723 (1965). A person claiming money damages on the grounds "a statute or regulation grants him that right, in terms or by implication, can properly come to the Court of Claims" and "the court will assume jurisdiction and decide his case on the merits. . ." *Id.* at 125-126.

It is not required that "there be any specific consent-to-suit apart from the Tucker Act." *South Puerto Rico Sugar Co. Trad. Corp.* v. *United States*, 167 Ct. Cl. 236, 244 (1964). "The authority for a suit is found in the general terms of the Tucker Act and need not be reiterated in every enactment of Congress upon which a claim against the United States could be 'founded.' " *Aycock-Lindsey Corp.* v. *United States*, 171 F.2d 518, 521 (5th Cir. 1948).

This has been explained as follows:

> To limit the recovery in cases "founded" upon a law of Congress to cases where the law provides in terms for a recovery would make that provision of the Tucker Act almost entirely unavailable, because it would allow recovery only in cases where laws other than the Tucker Act already created a right of recovery. "Founded" must therefore mean reasonably involving the application of a law of Congress. [*Compagnie General Transatlantique* v. *United States*, 21 F.2d 465, 466 (2d Cir. 1927) (A. Hand, J.), citing *Dooley* v. *United States*, 182 U.S. 222, 45 L.Ed. 1074 (1901) as in accord.]

(b) Civil Service statutes are not affirmative bars to suit

Neither the Lloyd-LaFollette Act nor the Back Pay Act nor other statute affirmatively denies Exchange Service employees all jurisdictional rights, contrary to petitioner's contentions. The former, as enacted in 1912, provided for control of the removal and suspen-

sion of individuals in the "competitive service", and did not address itself to nonappropriated fund activities at all. (Act of August 24, 1912, ch. 389, § 6. 37 Stat. 555, now 5 U.S.C. § 7501, formerly 5 U.S.C. § 652).

After this Court's 1942 decision in *Standard Oil Co. of California* v. *Johnson, supra,* the question arose whether Exchange employees should be included within the "competitive service" inasmuch as the Exchanges were instrumentalities of the United States. Clarification was needed and the present 5 U.S.C. § 2105(c) (formerly 5 U.S.C. § 150k) resulted. (Act of June 19, 1952, ch. 444, § 1, 66 Stat. 138.) The legislative history is pertinent. 2 U.S. Code Congr. and Admin. News, 1952, at 1520-28. House Report No. 1995 stated the purpose of the bill (S.1828) was to clarify status of nonappropriated fund employees who had not been considered covered by the Civil Service laws until *Standard Oil Co. of California* had precipitated questions.

The Report contained a Department of Defense opinion on the proposed bill, by letter dated June 25, 1951, wherein that Department recommended the proposal to exclude Exchange employees from Civil Service rules and regulations be enacted. The reason given was that including employees under Civil Service rules and regulations would be a hardship because post exchange employees are often transitory.[34]

[34] Many wives of servicemen work for post exchanges and they may, of course, be transitory depending on their husband's assignments and tours. Congress has recently expressed great interest, in respect to overseas installations, that there be "employment opportunities for military dependents" in commissaries. *H.A.S.C.* No. 92-75, at 16635. Many employees "are, of necessity, temporary and part-time." *Id.* at 16615.

The Civil Service Commission opinion, by letter dated July 23, 1951, commented that prior to *Standard Oil Co. of California* v. *Johnson, supra.,* the Exchange employees were considered employees of the Exchanges "working under what amounted to a private contract of employment." [35]

The Committee report advised Congress that the bill would not take away existing rights of Exchange employees nor confer new ones. The bill passed, becoming 5 U.S.C. § 150k and now 5 U.S.C. § 2105(c), and made laws carried out by the Civil Service Commission inapplicable to Exchange employees.

The Back Pay Act, which petitioner also refers to, provides that the Civil Service Commission shall administer that act. Pub. L. 90-83, § 1(34)(c), Sept. 11, 1867, 81 Stat. 201 (5 U.S.C. § 5596). Therefore, it also, in view of 5 U.S.C. § 2105(c), is not applicable to Exchange employees. But again, there is no specific refference in the act to such employees.

These statutes, and others administered under the Civil Service Commission areas of responsibility, do not apply to Exchange employees, but this does not mean that Congress intended such employees to have no contract rights nor other rights arising from the various jurisdictional bases set forth in the Tucker Act.[36] The Fifth Circuit rejected the identical conten-

[35] The C.S.C. letter complained that the bill was not clear enough in that it did not say whether Exchange employees were federal employees for other purposes such as crediting Exchange employment for retirement and retention purposes if the employee subsequently becomes a Civil Service employee. Congress appears to have ignored this invitation to further clarification.

[36] In some sections of U.S.C. Title 5 (Government Organization and Employees), Congress has specifically applied provisions to

tion by the government, as discussed below. *Young* v. *United States,* 498 F.2d 1211 (1974).

(c) Regulations and due process as basis for suit

Petitioner's contention that there is no statute or regulation or other substantive right of Exchange employees to be enforced against the United States is refuted in recent decisions by this court. In *Young* v. *United States, supra,* the Fifth Circuit applied those decisions to facts substantially identical ot the present. The *Young* plaintiff was an employee of the Army and Air Force Exchange Service, subject to the same regulations, AR 60-21/AFR 147-15, as respondent. 498 F.2d at 1219-20. See Appendix A herein of Brief of United States at 3A-17A for the regulations and in particular Section 3-8 (at 6A) relating to separation for cause. The Fifth Circuit held "these safeguards and standards establish protections against arbitrary dismissal." *Id.* at 1220. They constitute "attributes of 'property' interests protected by procedural due process" as described in *Board of Regents* v. *Roth,* 408 U.S. 564, 33 L.Ed. 2d 548 (1972). The claimant's interest in continued employment "is well within the parameters defining property interests protected by the Fifth and

nonappropriated fund activities, e.g., § 5531 (dual compensation), § 7902 (safety programs), § 8501 (unemployment compensation). The Executive branch groups Exchange employees with other federal employees for some purposes. For example, section 2(b) of Executive Order 11491, dated October 29, 1969, establishing a program of Labor Management Relations in the federal service, declares that the "employees" covered by its provisions include employees of both agencies and nonappropriated-fund instrumentalities. 34 F.R. 17605, 3 C.F.R. (1966-1970 Comp.) 861, 862. According to its preamble, the purpose of the order was to establish "effective labor-management relations *within the Federal service.*" *Id.* at 862. (emphasis supplied)

Fourteenth Amendments in such recent cases as *Goldberg* v. *Kelly,* 1970, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (termination of welfare benefits); *Morrissey* v. *Brewer,* 1972, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed 2d 484 (parole revocation); *Bell* v. *Burson,* 1971, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed. 2d 90 (revocation of driver's license); *Sniadach* v. *Family Finance Corp.,* 1969, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (garnishment of wages)." *Id.* at 1220-21.

The Fifth Circuit noted that the regulations defining employment relationship of the Exchange employee, unlike the Civil Service employee in *Arnett* v. *Kennedy,* 416 U.S. 134, 40 L.Ed. 2d 15 (1974),

> . . . is not governed by terms and conditions of an employment which flow from a discrete federal statutory provision. But interests protected by the Fifth Amendment need not be, and in fact often are not, grounded in federal statutory law. [*Id.* at 1219.]

The inapplicability of the Lloyd-LaFollette Act to Exchange employees does not alter this and, indeed, "the plaintiff here has more of a claim of entitlement than the plaintiff in *Arnett,* because the Army and Air Force regulations . . . provide standards for effecting separations which are more vigorous and more fully articulated than those contained in the Lloyd-LaFollette Act." *Id.* at 1221.

Further, because "the establishment and control of post exchanges have been in accordance with regulations rather than specific statutory directions does not alter their status, for authorized War Department regulations have the force of law." *Standard Oil Co. of California* v. *Johnson,* 316 U.S. at 484. Those regula-

tions were promulgated "under authority of Congressional enactments." 316 U.S. at 483-484.

The Fifth Circuit held that the relationship established under the regulations, AR 60-21/AFR 147-15, "is subject to the protection of the Due Process Clause of the Fifth Amendment." *Young* v. *United States,* 498 F.2d at 1221.

Furthermore, it is immaterial whether the Army and Air Force regulations ensued from a discrete federal statutory provision. There must be conformance with procedural safeguards set down by regulations, even though such safeguards are gratuitous. *Vitarelli* v. *Seaton,* 359 U.S. 535, 539, 3 L.Ed. 2d 1012, 1016 (1959). Specified discharge procedures beyond the necessities of statute must be scrupulously observed. *Service* v. *Dulles,* 354 U.S. 363, 1 L.Ed. 2d 1403 (1957).

It has long been established that an employee is entitled to the pay of his office if discharged in violation of statutory or other authority. *United States* v. *Perkins,* 116 U.S. 483, 29 L.Ed. 700 (1886).[37]

(d) Lack of explicit reference in legislative history is not significant

Petitioner contends the lack of explicit reference in the legislative history of Pub.L. 91-350 to Exchange employees establishes Congress did not intend to grant such employees a right to sue the United States.

[37] That case laid down the rule that when Congress "vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest . . . .", The heads of the departments must be so governed, and if the limitations are violated, the claimant "is entitled to the pay attached to [his position]." 116 U.S. at 483. *Perkins* is still the foundation in pay cases. *E.g., Borak* v. *United States,* 110 Ct. Cl. 236 (1948).

The legislative history makes quite clear that Congress was concerned with a "gap" or "loophole" whereby the United States escaped responsibility for its Exchange Services and that "gap" or "loophole" was framed by the four cases relied on by Congress: *Borden, Pulaski, Keetz,* and *Kyer.* Correction of the "harsh result" in *Keetz* (168 Ct. Cl. at 207, European Exchange Service employee claim identical to respondent's) was the intent and purpose of Congress. (See Statement C, above.)

There was no need for Congress to make explicit reference to employee claims.[38] It was aware that Exchange employees had been barred from suit. It was told by all witnesses the proposed bill would close the last "gap" or "loophole" of immunity. It was told by the Chief Judge of the Court of Claims that the judges of the Court of Claims "have no suggestions for any changes or amendments." (Statement D, above.)

Congress was not informed by the Department of Justice or other executive departments that there existed another, unmentioned "gap" or "loophole" through which the Government, when this respondent

[38] Petitioner refers to the "vast number" of Exchange employees in excess of 100,000 (Brief of United States, at 7) for the point that Congress would have been explicit if intending to benefit them. But neither is the number of business contractors providing billions of dollars of materials and services expanded on in the legislative history. That large numbers of businesses and employees were involved was obvious from the nature of the Exchange operations. For reasons stated in the text, Congress grouped all together as contractors. There is nothing in the legislative history indicating Congress was concerned in particular with the vast number of businessmen contracting with the Exchange Services to the exclusion of individuals who run the Exchanges and lack the self-protecting position businessmen possess.

filed suit, would "ultimately retreat into the anochronism of government immunity." (Statement D, above.) Surely, petitioner does not seek to wring the old concept one more time so that "all of this old straw would have to be threshed [again] to find the kernel of relief." *Guggenheim* v. *United States,* 127 Ct. Cl. 121, 126 (1953).

(c) Pre-1970 non-jurisdiction holdings no longer valid

Petitioner contends that the pre-1970 treatment of Exchange Service employees as jurisdictional pariahs should remain in effect, although no justification of policy or governmental need is offered. The pre-1970 decisions of the Court of Claims on which petitioner is balancing hinged on this court's observation that the "government assumes none of the financial obligations of the exchange." 316 U.S. at 485. Quite clearly, that apparently misconstrued comment is no longer valid. Crimes against the Exchange Services are crimes against the United States and prosecuted by it. The United States is liable for all torts of the Exchanges. It is liable for all contract claims (subject to reimbursement) of the Exchanges. Exchange employees are excluded, for practical reasons, from Civil Service Commission administered laws but are subject to many other statutes governing federal employees. Exchange Services *per se* enjoy immunity domestically and abroad. (See Statement C, above.)

Any support for the non-jurisdiction holdings of *Borden, Pulaski, Keetz,* and *Kyer,* of doubtful validity in any event, has been nullified by later developments and, therefore, the United States is liable for and amenable to suit under the Tucker Act for claims arising from its gargantuan instrumentality. Congress

made this abundantly clear. It closed the last "gap" or "loophole" of immunity then remaining in the Court of Claims, and undertook to bar any "additional loophole". (Statement D, above.)

III

RESPONDENT'S CLAIM, IRRESPECTIVE OF ITS CONTRACT BASIS, IS FOUNDED UPON THE CONSTITUTION, ACTS OF CONGRESS, AND REGULATIONS, AND IS FOR NON-TORT DAMAGES.

Respondent's claim is within the jurisdiction of the Court of Claims because (a) the United States is now fully liable for obligations of the Exchange Services, (b) respondent's discharge in violation of executive regulation constitutes a claim enforceable under the Tucker Act, and (c) his discharge without due process constitutes a claim founded on the Constitution as well as subject to judicial review under the Administrative Procedure Act and, therefore, enforceable under the Tucker Act.

(a) United States is now fully liable for Exchange Service activities.

The Exchange Services are no longer instrumentalities which petitioner can abjure in the Court of Claims on the grounds the United States has assumed "none of the financial obligations" thereof. As noted heretofore, Congress monitors Exchange operations and periodically appropriates funds for them; executive regulations govern the Exchanges and government officials control them with resulting operating profits put to government-directed use;[39] the United States prose-

[39] A House Subcommittee found in 1972 that there was "excessive pressure" on the Exchanges to increase profit margins with the objective of generating more funds for welfare and recreational purposes. H.A.S.C. No. 92-75, at 16613.

cutes financial and other crimes against the Exchanges; the United States is liable for all torts committed by employees of the Exchanges; and the United States is liable on all contracts of the Exchanges. The Exchanges have the usual accouterments of governmental entities including the franking privilege [40] and absence of taxability, both state (by immunity) and federal (because an instrumentality).

Obviously, the United States has now fully assumed both the obligations and benefits of the Exchange Services. Congress never affirmatively conferred immunity on the United States in respect to Exchange operations, and by the 1970 amendment it closed the "gap" or "loophole" of immunity caused by the Court of Claims concept of non-responsibility for "nonappropriated fund" activities.[41] The underpinnings of non-jurisdiction in *Borden, et al.*, are gone and that concept is no longer tenable in respect to the Exchange Services. The United States is, therefore, accountable for Exchange operations to the same extent as it would be under the Tucker Act for activities of other executive agencies.

(b) Respondent's claim for discharge in violation of executive regulations is an enforceable claim against the United States under the Tucker Act.

Respondent's cause of action states his discharge from the Exchange Service was procedurally defective

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[40] Exchanges have had the franking privilege for many years. January 23, 1902, Circular No. 5, Hdqrs. of the Army.

[41] "A statute cannot be divorced from the circumstances existing at the time it was passed or from the evil which Congress sought to prevent or correct." *Benton* v. *United States*, 203 Ct. Cl. 263, 270 (1973).

because, *inter alia*, it was effected by an unauthorized military officer, without adequate notice and otherwise in violation of governing regulations, the appeal and review procedure was defective, the discharge was arbitrary and capricious and without substantial support, and was in violation of due process and a breach of respondent's contract of employment. (Petition of plaintiff in Court of Claims) It must be assumed for the purpose of this appeal that the aforesaid allegations are correct.

It has long been established that a federal employee is entitled to the pay of his office if discharged in violation of statutory or other authority. *United States* v. *Perkins*, 116 U.S. 483, 29 L.Ed. 700 (1886). Although, in the absence of restrictions, the executive has full discretion in respect to employees (*Butler* v. *Pennsylvania*, 51 U.S. (10 How.) 402, 417, 13 L.Ed. 472, 478 (1850)), this is not so where limitations are prescribed, in which event the executive must be so governed. *United States* v. *Perkins, supra;* see footnote 37, above.

There existed elaborate procedures for discharge actions which were applicable to respondent's position and these were in the form of authorized executive regulations which had the full force and effect of law. *Standard Oil Co. of California* v. *Johnson, supra; Vitarelli* v. *Seaton, supra; Service* v. *Dulles, supra; Young* v. *United States, supra.* See Argument II, (c), above.

The Court of Claims has jurisdiction under the Tucker Act over discharge claims of federal employees who lack Lloyd-LaFollette Act or Veterans Preference Act or other Civil Service protection from dismissal and allege procedural error or arbitarariness in the dismissal action. *Batchelor* v. *United States*, 169 C. Cl.

180 (1965) (claim of a Schedule A or excepted employee heard and then dismissed on the grounds there was no showing of procedural error or arbitrariness).

Therefore, respondent's claim is one against the United States founded upon regulations of the executive department and for non-tort damages and is within the jurisdiction of the Court of Claims.

(c) Respondent's claim is also founded on Fifth Amendment and Administrative Procedure Act and is, therefore, within the jurisdiction of the Court of Claims.

Respondent was entitled to procedural due process. U.S. Const. amend. V. An employee of the Exchange Service has property interests in being continued in his position sufficient to require procedural due process prior to his discharge. *Young* v. *United States, supra*. See Argument II (c) above. The Administrative Procedure Act relating to judicial review (5 U.S.C. §§ 701-706) entitles respondent to a review of the discharge procedures effecting his dismissal. *Id.* at 1221; *Charlton* v. *United States,* 412 F.2d 390 (3rd Cir. 1969); *Polcover* v. *Secretary of Treasury,* 477 F.2d 1223 (D.C. Cir. 1973).

The Tucker Act authorizes the Court of Claims to adjudicate claims against the United States founded upon the Constitution and any Act of Congress, or for liquidated damages not sounding in tort. Respondent claims his discharge was in violation of procedural due process, was arbitrary and capricious, and lacked substantial support in fact. Therefore, his claim is founded upon the Fifth Amendment and for this further reason is within the jurisdiction of the Court of Claims.

CONCLUSION

Respondent was one of over 100,000 Exchange Service employees who, unlike any other employees in the United States, have heretofore been denied all judicial recourse for violation of employment rights. This intolerable condition has been corrected by the Court of Claims whose judgment below should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

ALICE R. HOPKINS, SPECIAL ADMINISTRATOR OF THE ESTATE OF ROY C. HOPKINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
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In our main brief we showed that the Court of Claims should have dismissed this suit for lack of jurisdiction, since the 1970 amendment to the Tucker Act, which provides that an express or implied contract with the exchange service shall be considered an express or implied contract with the United States, is inapplicable to exchange service employees whose employment, like that of other federal employees, is not based upon a contractual relationship with the government. We submit this reply brief to respond to respondent's contention (Resp. Br. 51-54) that, notwithstanding the inapplicability of the 1970 amendment, the Court of Claims nevertheless had jurisdiction because the claim advanced by respondent's deceased husband was founded upon the Constitution or upon a regulation of an executive department.

As we demonstrated in our opening brief, the Tucker Act does not itself create any substantive right, enforceable against the United States, to "actual, presently due money damages" (*United States* v. *King*, 395 U.S. 1, 3), but merely confers jurisdiction on the Court of Claims whenever such a substantive right otherwise exists. The Court of Claims has no jurisdiction where "the basis of the federal claim—be it the Constitution, a statute, or a regulation—cannot be held to command, in itself and as correctly interpreted, the payment of money to the claimant, but in which some other principle of damages has to be invoked for recovery." *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1008 (Ct. Cl.); accord, *Mosca* v. *United States*, 417 F.2d 1382, 1386 (Ct. Cl.).[1]

[1]The Tucker Act provides that a claim of entitlement to money damages must be "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort" (28 U.S.C. 1491).

In our opening brief we showed that respondent's claim was not founded upon an express or implied contract with the United States, notwithstanding the 1970 amendment to the Tucker Act.

So far as noncontractual cases are concerned, the Court of Claims has said that claims of entitlement to money damages may be grouped into two categories: "those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; and those demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury." *Eastport S.S. Corp.* v. *United States*, *supra*, 372 F.2d at 1007; see also *Clapp* v. *United States*, 117 F. Supp. 576, 580 (Ct. Cl.). Where a claimant seeks the return of his own money, alleged to have been wrongfully collected and withheld by the government, the claimant's recovery would draw upon a "fund" created by the claimant himself. Accordingly, the interests of the general citizenry in preservation of the public fisc are only incidentally involved in such cases since, if wrongfully collected and withheld, the money paid to the government by the claimant could not in theory properly be disbursed to defray the cost of government operations. By contrast, where the claimant seeks recovery from the public treasury of monies not directly derived from payments by him, his recovery would draw upon a "fund" that exists only because of the lawful exercise of the government's power to collect and retain money. In the latter class of cases, therefore, express congressional authority "mandating compensation" is required before the claimant may recover. See *Eastport S.S. Corp.* v. *United States*, *supra*, 372 F. 2d at 1008-1009.

The complaint in this case alleged, *inter alia*, that respondent's husband's discharge from the Army and Air Force Exchange Service denied him due process and violated applicable exchange service regulations (see Resp. Br. 52-53). Those allegations, standing alone, were insufficient to invoke the jurisdiction of the Court of Claims, as that court acknowledged when it observed that, prior to the 1970 amendment, the Tucker Act had not conferred jurisdiction to review discharges of military exchange employees (Pet. App. 2a-4a). The Due Process Clause of the Fifth Amendment does not "command, in itself * * * the payment of money to the claimant," so that even if the constitutional allegations in the complaint were correct the Court of Claims had no jurisdiction to award monetary damages based upon those allegations.[2] Respondent's contention to the contrary, if

[2]*Young* v. *United States*, 498 F. 2d 1211 (C.A. 5), upon which respondent relies in this regard (Resp. Br. 46-47, 54), provides no basis for the proposition that an alleged denial of due process is sufficient to invoke the jurisdiction of the Court of Claims under the Tucker Act. To the contrary, the court in *Young* expressly held that the complaint there, which had alleged, *inter alia*, that the contested discharge from the exchange service had denied due process and violated applicable exchange service regulations, was insufficient to invoke jurisdiction under the Tucker Act (*id.* at 1217) but that the district court nevertheless had jurisdiction to entertain the complaint under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* (*id.* at 1218-1223). Although in our view the latter conclusion was incorrect, it does not affect the instant case, which concerns the jurisdiction of the Court of Claims.

accepted, would effectively overrule the well-established rule that a waiver of sovereign immunity from claims against the public treasury cannot be implied but must be unequivocally expressed. *United States* v. *King, supra,* 395 U.S. at 4; *Soriano* v. *United States,* 352 U.S. 270, 276.

Similarly, the regulation governing respondent's employment with the Army and Air Force Exchange Service (AR 60-21/AFR 147-15) does not "command, in itself * * * the payment of money to the claimant" for wrongful discharge. But even if some such right fairly could be implied from the regulation, it would not be sufficient to invoke the jurisdiction of the Court of Claims since it was not promulgated pursuant to an Act of Congress creating such a right. A litigant's right to collect from the public treasury must derive from an Act of Congress.[3] As this Court noted in *United States* v. *U.S. Fidelity Co.,* 309 U.S. 506, 513:

> It is a corollary to immunity from suit on the part of the United States * * * that this immunity cannot be waived by officials. If the contrary were true, it would subject the Government to suit in any court in the discretion of its responsible officers. This is not permissible.

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[3]An exception, of course, is the Just Compensation Clause of the Fifth Amendment, which confers a right of recovery on persons whose property is taken by the United States in contravention of its terms. See *Jacobs* v. *United States,* 290 U.S. 13, 16.

The statutory authority pursuant to which the regulation governing the Army and Air Force Exchange Service is promulgated, 10 U.S.C. 3012 and 8012, merely authorizes the Secretaries of the Army and the Air Force to conduct the affairs of the two departments. It does not authorize the Secretaries to obligate public funds for the exchange service. Indeed, Congress has expressly prohibited the Secretaries from allocating to the exchange service the funds appropriated for support of the Army and Air Force. 10 U.S.C. 4779(c), 9779(c). Although "post exchanges * * * are arms of the Government deemed by it essential for the performance of governmental functions," nevertheless "[t]he Government assumes none of the financial obligations of the exchange." *Standard Oil Company of California* v. *Johnson,* 316 U.S. 481, 485.

As we indicated in our opening brief, the government has now assumed the contractual obligation of the exchanges by virtue of the 1970 amendment to the Tucker Act which makes contracts with military exchanges contracts "with the United States." But the government has not assumed their noncontractual obligations, for Congress has not authorized, let alone required, payment of such obligations out of the public treasury.[4]

In short, federal employees who allege that they have been discharged in violation of authorized regulations have a claim for money damages for lost wages from the United States that is cognizable in the Court of Claims *only* if the wages of which they were deprived would have derived from the public treasury pursuant to an

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[4]Thus, in *United States* v. *Perkins,* 116 U.S. 483, upon which respondent relies, the claimant recovered in the Court of Claims back pay for allegedly unlawful discharge, where his salary had been duly authorized by Congress. See also *United States* v. *Wickersham,* 201 U.S. 390, 399-400.

Act of Congress.[5] Since in the instant case the lost wages claimed by respondent on behalf of her husband's estate would not have derived from the public treasury pursuant to an Act of Congress, the Court of Claims was without jurisdiction to entertain the claim that the discharge here denied due process and violated applicable Army and Air Force Exchange Service regulations.

For the reasons stated here and in our opening brief, the judgment of the Court of Claims should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[5]Moreover, to make those obligations payable out of the public treasury would be doubly anomalous in view of the fact that Congress has not placed any limit on the rates of compensation of exchange service employees; to subject the United States to claims for back pay for unlawful discharge of such employees would place the size of disbursements, which were themselves unauthorized and unappropriated, at the discretion of officials of the executive branch.